TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~711~~ 28

MAXINE K. HINKLE, ADMINISTRATRIX OF THE ESTATE OF W. MAX HINKLE, DECEASED, AND MAXINE K. HINKLE, PETITIONERS,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 8, 1958
CERTIORARI GRANTED MARCH 10, 1958

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,740

CIVIL.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, APPELLANT,

VS.

MAXINE K. HINKLE, ADMINISTRATRIX OF THE ESTATE OF W. MAX HINKLE, DECEASED, AND MAXINE K. HINKLE, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

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[fol. 1] (Stipulation of Counsel approving Record on Appeal, etc.)

In the United States Court of Appeals for the Eighth Circuit.

New England Mutual Life Insurance Company,
Appellant,
No. 15,740. vs. Civil.
Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased and Maxine K. Hinkle, Appellees.

It is hereby agreed by and between the parties hereto that the following record shall constitute and be the record on appeal to the United States Court of Appeals for the Eighth Circuit and it is further agreed that the United States District Court for the Southern District of Iowa, Central Division had jurisdiction of this cause, docketed in said Court as Civil Action 3-659, and that said case was properly removed by defendant from the District Court of the State of Iowa in and for Polk County to the United States District Court for the Southern District of Iowa, Central Division, and that the petition for removal was filed in said Court on November 8, 1955.

PHINEAS M. HENRY,

RALPH A. CHURCH,

LUTHER L. HILL, JR.,
Attorneys for Appellant.

L. S. FORREST,
Attorney for Appellees.

[fol. 2] Petition at Law.

(Filed in Polk County District Court, November 1, 1955
Filed in United States District Court in Petition for
Removal November 8, 1955)

In the District Court of the State of Iowa
In and for Polk County.

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, Plaintiffs,
Law No. 65,540. vs.
New England Muaual Life Insurance Company, of Boston, Massachusetts, Defendant.

The Plaintiffs State:

That the Plaintiffs claim relief as prayed for herein alternatively arising out of the same transaction and the case presents questions of law and questions of fact common to both of them.

Count I.

The Plaintiff Administratrix for her cause of action states:

1. That she is the duly appointed, qualified and acting Administratrix of the Estate of W. Max Hinkle, Deceased.

2. That the Defendant is a corporation organized under the laws of Massachusetts and is authorized to do a life insurance business in the State of Iowa, and at the time hereinafter mentioned was engaged in soliciting life insurance in the State of Iowa.

3. That on the 25th day of February, 1955 the Defendant entered into and delivered to W. Max Hinkle a contract of life insurance in writing, in words and figures as follows:

Exhibit A.

"Conditional Receipt Do Not Destroy

Received Twenty-one and 70/100 Dollars in connection with an Application made this day to the New England

Mutual Life Insurance Company, of Boston, Massachusetts, for Insurance of $10,500 on the life of W. Max Hinkle Immediate Coverage.

[fol. 3] "The Insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft be given in payment of this premium is not paid on presentation this receipt shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Countersigned 2/25/1955
(signed) Philip C. Raye, Secretary
(silgned) Rodney Bliss, Jr.
General Agent.

"If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt the premium will be refunded."

4. That the above contract, Exhibit A, was prepared and printed by the Defendant, and that the parts that were not printed, especially the words "Immediate Coverage" were written in it with pen and ink by Defendant and it was countersigned by the General Agent of the Defendant.

5. That W. Max Hinkle died on February 26, 1955, and that thereafter Defendant repudiated said contract, did acts calculated to defeat its liability, denied liability and refused to abide by said contract, and thus did breach said contract.

6. That there is justly due the Plaintiff under the terms of said contract the sum of $10,500 with interest thereon

from February 26, 1955, and by reason of Defendant's said breach Plaintiff is damaged in said amount.

Wherefore, Plaintiff Administratrix prays for judgment against Defendant on Count I of this petition in the sum of $10,500 with interest thereon from February 26, 1955 and the costs of this action.

Count II.

The Plaintiff Administratrix for Count II of this petition states:

1. All the facts heretofore stated in Count I of this petition.

2. That W. Max Hinkle was in good and insurable health on said date the contract was made.

[fol. 4] 3. That all conditions precedent to be performed by W. Max Hinkle or this Plaintiff have been performed, except those excused by impossibility and those which the Defendant has prevented from being performed, or has waived.

4. That after the above named contract, Exhibit A, was entered into and delivered by Defendant's agent to W. Max Hinkle, the Defendant directed said Hinkle to take a physical examination before a physician named by Defendant and under Defendant's employ, and set the date for said examination for the following Monday, February 28, 1955 at the office of Defendant's doctor, and said Hinkle orally acquiesced in said direction to take said examination at the aforesaid time and place so named by Defendant's said agent.

5. That the Defendant company has never determined or claimed that the said Hinkle was not insurable, and has by its conduct waived that provision or condition of Exhibit A.

6. That the condition of taking the physical examination at the time and place fixed became impossible of performance by reason that said Hinkle was suddenly killed

on Saturday, February 26, by the crashing of his airplane, and at the time fixed for the examination he was dead, and that said condition was excused by such impossibility.

7. That any and all other conditions not mentioned in paragraphs 4 to 6 inclusive above, were prevented from occurring by the acts and willful conduct of the Defendant, or were waived by the Defendant.

8. That W. Max Hinkle is dead, and has been since the 26th day of February, 1955; and that the Defendant had immediate knowledge thereof; and breached the contract by denying liability, refused to pay the insurance, and did acts calculated to defeat liability and to create a defense.

9. That by reason of the defendant's breach and refusal to pay, ~~this~~ Plaintiff is damaged in the sum of $10,500 with interest thereon from the 26th day of February, 1955, and that there is justly due the Plaintiff under the terms of said contract the sum of $10,500, with interest thereon from February 26, 1955, no part of which has been paid.

Wherefore, this Administratrix Plaintiff prays for judgment against the Defendant in the sum of $10,500 with interest thereon from the 26th day of February, 1955, and the costs of this action.

[fol. 5] Count III.

The Plaintiff, Maxine K. Hinkle states:

1. The facts herein stated in paragraphs 2, 3, 4 and 5 of Count I of the petition.

2. ~~That the~~ Defendant has represented that this Plaintiff is the named beneficiary of the insurance and that thus this Plaintiff is uninformed whether this cause of action belongs to the Estate or to her personally, and thus sues in the alternative, and states on information that she is the named beneficiary.

3. That by reason of the Defendant's breach as aforesaid, this Plaintiff is damaged in the sum of $10,500 with interest thereon from the 26th day of February, 1955, and that there is justly due this Plaintiff from Defendant the sum of $10,500 together with interest from February 26, 1955, no part of which has been paid.

Wherefore, this Plaintiff prays in the alternative that this Plaintiff have judgment against the Defendant in the sum of $10,500, together with interest thereon from the 26th day of February, 1955, and the costs of this action.

Count IV.

The Plaintiff, Maxine K. Hinkle, for Count IV of this petition states:

1. All the facts stated in paragraphs 2, 3, 4, and 5 of Count I of this petition.

2. All the facts stated in paragraphs 2, 3, 4, 5, 6, 7, and 8 of Count II of this petition.

3. That Defendant has represented that this Plaintiff is the named beneficiary of the insurance, and upon this information she alleges that she is the beneficiary of the insurance herein.

4. That by reason of the Defendant's breach as aforesaid she is damaged in the sum of $10,500 together with interest thereon from the 26th day of February, 1955, and that said sum is justly due this Plaintiff, no part of which has been paid.

Wherefore, this Plaintiff prays judgment against the Defendant on Count IV of this petition in the sum of $10,500 together with interest thereon from the 26th day of February, 1955, and the costs of this action.

L. S. FORREST,
Attorney for Plaintiffs.
25 Law Building at Drake University.

[fol. 6]

Answer.

(Filed in United States District Court, December 5, 1955)

In the United States District Court for the Southern District of Iowa, Central Division.

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, Plaintiffs,
No. 3-659. vs Civil Action.
New England Mutual Life Insurance Company of Boston, Massachusetts, Defendant.

For answer to the petition of the plaintiffs, defendant states as follows:

Answer to Count I.

First Defense.

1. It admits paragraph 1 on information and belief.

2. It admits paragraph 2.

3. Answering paragraph 3 it admits that Rodney Bliss, Jr., general agent of the defendant in Des Moines, Iowa, signed and delivered to W. Max Hinkle a conditional receipt as referred to in said paragraph but denies that the same was a contract of life insurance. A true and correct photostatic copy of said conditional receipt showing what was printed and what was in writing is attached hereto and made a part hereof and marked Exhibit 1.

4. Answering paragraph 4 it admits that the printed form of conditional receipt was prepared and printed by it and states that the written words and figures, to-wit: "Twenty-one and 70/100", "$10,500", "Immediate coverage" and the date and signature, "Rodney Bliss, Jr., General", were written by the said Rodney Bliss, Jr.; it denies that said receipt was a contract of insurance.

[fol. 7] 5. Answering paragraph 5 it admits on information and belief that W. Max Hinkle died on February 26, 1955, and that it denied any liability under said conditional receipt, but denies the remainder of said paragraph and alleges that there was no contract of insurance between the defendant and W. Max Hinkle.

6. It denies paragraph 6.

Second Defense.

For further and separate defense to Count I it repeats the allegations of the First Defense above and states as follows:

1. That at the time of the delivery of the conditional receipt referred to above and as a part of the same transac-

tion the said W. Max Hinkle executed Part I of an application to the defendant for insurance on his life and that a copy of said application is attached hereto and made a part hereof and marked Exhibit 2.

2. That the said W. Max Hinkle told Rodney Bliss, Jr., the general agent of the defendant who obtained said application, that he wished to apply for a decreasing term policy for a period of twenty years for the purpose of providing funds to pay off a mortgage on his home in Des Moines, Iowa, which mortgage was payable in instalments and he informed the said Rodney Bliss, Jr., that he wanted a policy with an initial death benefit in the sum of $10,500 and he gave the said Rodney Bliss, Jr. a check in the sum of $21.70 payable to New England Mutual Life Insurance Company which was the amount of the first quarterly premium on the policy applied for.

3. That Part I of said application contains the agreement: "It is hereby agreed that this application, including Part II, a copy of which is to be attached to the policy when issued, shall become a part of every policy issued hereon."

[fol. 8] 4. That the original of said Part I was delivered to an attorney representing the plaintiff at his request shortly after the death of W. Max Hinkle, and it alleges on information and belief that said Part I is now in the possession of the plaintiff and her attorney.

5. That Part II consists of statements made by the proposed insured to the medical examiner as to his previous condition of health and the report of the medical examiner upon a physical examination of the proposed insured.

6. That on the date of the execution of Part I and delivery of the receipt referred to, the said Rodney Bliss, Jr. arranged with Dr. E. R. Posner, Des Moines, Iowa, as medical examiner for the defendant, to give W. Max Hinkle a medical examination at 11:45 A.M. on the same date but that the said W. Max Hinkle, after said appointment had been made, told Rodney Bliss, Jr. that he would be too busy to take the same and would take it on the following Monday, February 28, and an appointment was made for that date.

7. That the said W. Max Hinkle died on February 26, 1955, and that his death resulted from travel or flight in an aircraft of which he was acting as pilot and which was owned by him.

8. That the said Part II was never completed by W. Max Hinkle and no complete application was ever made to the defendant for life insurance on his life and that no contract of insurance, temporary or permanent, was entered into between the said W. Max Hinkle and the defendant.

9. That the conditional receipt, Exhibit I, provides that the insurance applied for shall be in full force and effect from the date thereof "provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston," and because of the failure of the said W. Max Hinkle to take the medical examination, no such satisfactory evidence has ever been received at the Home Office of the defendant in Boston and the insurance applied for never went into effect.

[fol. 9] 10. That at the time of the execution of the conditional receipt referred to above, the said W. Max Hinkle, delivered to the said Rodney Bliss, Jr. a check for $21.70 payable to the order of New England Mutual Life Insurance Company; that said check was never cashed or deposited to the account of the defendant; that shortly after the death of W. Max Hinkle the said Rodney Bliss, Jr. was notified by Mr. Ray Nyemaster, an attorney representing the plaintiff that he was investigating the liability of the defendant company and that he would hear from him further; that the said Rodney Bliss, Jr. notified Mr. Nyemaster at that time that the application for insurance on the life of W. Max Hinkle had never been completed because of the failure of W. Max Hinkle to take a physical examination and that no insurance on his life was in force; that he heard nothing further from him until May 19, 1955, when other attorneys associated with Mr. Nyemaster notified him that they were taking no action in the matter; that on May 19, 1955, he mailed said check to the plaintiff; that the attorney for the

plaintiff in this action returned said check to him by mail on June 13, 1955; that said original check is in the possession of the defendant's attorneys and the defendant has been at all times and is now ready and willing to deliver the same to he plaintiff and that it hereby offers and tenders the same to the plaintiff.

Third Defense.

For further and separate defense to Count I the defendant repeats the allegations of its First Defense and states as follows:

1. That the policy applied for was a decreasing term policy providing decreasing term insurance for a term of 20 years and for an initial amount of insurance during the first year in the sum of $10,500, which amount would decrease each year thereafter in the sum of $500, the purpose of said insurance being to provide funds for the payment of a mortgage on the home of the said W. Max Hinkle in Des Moines, Iowa, which mortgage was payable in installments.

[fol. 10] 2. That the printed form of the conditional receipt, Exhibit 1, contained no space for a description of said policy other than the face amount thereof and in order to make it clear that said policy would not always be in the amount of $10,500, but would be in a decreasing amount, the said Rodney Bliss, Jr., wrote the words "Immediate Coverage" under the figure "$10,500" in said receipt to show that the initial amount of insurance for the first year would be in the sum of $10,500.

3. That the said Rodney Bliss, Jr. had no power or authority on behalf of the defendant to make or alter contracts of insurance or to alter the terms of said [conditonal] receipt and if the words "Immediate Coverage" are construed to be an agreement on the part of the said Rodney Bliss, Jr. that the insurance applied for would take effect immediately upon delivery of said receipt, said agreement was not authorized by the defendant and was not ratified by the defendant and is not binding upon the defendant.

Fourth Defense.

For further and separate defense to Count I, the defendant repeats the allegations of its First Defense and states as follows:

1. That at the time of the delivery of the [conditonal] receipt referred to above and as a part of the same transaction the said W. Max Hinkle executed Part I of an application to the defendant for insurance on his life and a copy of said application is attached hereto and made a part hereof and marked Exhibit 2.

2. That in answer to Question 17A of said application, "Does the proposed insured plan to make flights as a trainee, pilot or crew member or has he made such flights within 10 years?" the said W. Max Hinkle gave the answer "No."

[fol. 11] 3. That said application was signed by the said W. Max Hinkle after the answer "No" had been written thereon in answer to Question 17A and that said application contains the following statement over his signature: "The foregoing information is true and complete and is correctly recorded."

4. That in truth and in fact the said W. Max Hinkle was a licensed aeroplane pilot and owned his own plane and had made many flights within 10 years previous to the date of said application, the exact number of which is not known at this time by the defendant, and planned to make further flights in the future and in fact planned to make a flight the following day to Omaha, Nebraska.

5. That if the true facts had been stated in answer to said question the policy applied for would not have been issued for the amount, plan and rating applied for and that even if the transaction between the said W. Max Hinkle and Rodney Bliss, Jr. was a contract for temporary insurance, which the defendant denies, the said contract was conditional and subject to the provisions of the conditional receipt referred to and the insurance applied for never took effect because the said W. Max Hinkle was not insurable

for the amount, plan and rating applied for under the rules of the defendant company on account of his aviation record.

6. That because of his aviation record, the said W. Max Hinkle could not furnish satisfactory evidence that he was on February 25, 1955, insurable for the amount, plan and rating applied for, and because of said fact the insurance applied for never went into force and effect.

Fifth Defense.

For further and separate defense to Count I it repeats the allegations of its First Defense above and states as follows:

[fol. 12] 1. That Section 508.28 of the Code of Iowa, 1954, prohibits the defendant from issuing a policy of life insurance in the amount of $10,500 until a medical examination has been passed by the applicant and by reason of said statute the said W. Max Hinkle was bound to know that the defendant would not insure his life without such examination.

2. That at the time of the execution of Part I of the application, a copy of which is marked Exhibit 2, and at the time of the delivery of the conditional receipt, Exhibit 1, the said W. Max Hinkle was orally notified by Rodney Bliss, Jr., the general agent of the defendant, that a medical examination was necessary.

3. That the failure of W. Max Hinkle to take the medical examination was due to no act of the defendant but was due solely to the refusal of the said W. Max Hinkle to take said medical examination on the date that he completed Part I of the application.

4. That because of the failure of the said W. Max Hinkle to take said medical examination, the application for said policy was never completed and the said W. Max Hinkle knew that he had not completed an application of life insurance pursuant to which a policy could be issued to him under the laws of the state of Iowa.

Sixth Defense.

For further and separate defense to Count I the defendant repeats the allegations of its First Defense and states as follows:

1. That at the time of delivery of the conditional receipt referred to above and as a part of the same transaction the said W. Max Hinkle executed Part I of an application to the defendant for insurance on his life and that a copy of said application is attached hereto made a part hereof and marked Exhibit 2.

2. That in said application, the plaintiff, Maxine K. Hinkle was designated by the said W. Max Hinkle as the beneficiary to be named in said policy and if the plaintiff [fol. 13] has any right of action against the defendant on account of the facts stated in the petition, which the defendant denies, the said right of action is in her individually and not as administratrix of the estate of W. Max Hinkle, deceased.

Answer to Count II.

First Defense.

1. Answering paragraph 1 it repeats the allegations of its First Defense in answer to Count I.

2. Answering paragraph 2 it has neither knowledge or information sufficient to form a belief as to the health of the said W. Max Hinkle and therefore denies the allegations of said paragraph.

3. It denies paragraph 3.

4. Answering paragraph 4 it admits that at the time the said conditional receipt was delivered to W. Max Hinkle, the said Rodney Bliss, Jr., requested the said W. Max Hinkle to have a physical examination by Dr. E. R. Posner, a medical examiner for the defendant, and secured an appointment for said examination in his office at 11:45 on the same date and that upon the request of the said W. Max Hinkle the said appointment was postponed until Monday, February 28, 1955, and because of the death of the said W. Max Hinkle on February 26, 1955, no physical examination was ever taken by him.

5. It denies paragraph 5.

6. Answering paragraph 6 it admits that it was impossible for W. Max Hinkle to take a physical examination on February 28, 1955, but denies that it was impossible for the said W. Max Hinkle to take said examination after the delivery of Exhibit 1 and prior to his death and denies that the taking of the physical examination was excused.

7. It denies paragraph 7.

[fol. 14] 8. In answer to paragraph 8 it admits that W. Max Hinkle died on February 26, 1955, and admits that Rodney Bliss, Jr., general agent of the defendant, was informed of his death on said date and admits that it has refused to pay any insurance on his life but denies that there was any contract for insurance and denies the remaining allegations of said paragraph.

9. It denies paragraph 9.

Second Defense.

For further and separate defense to Count II it repeats the allegations of its Second Defense in answer to Count I above.

Third Defense.

For further and separate defense to Count II it repeats the allegations of its Third Defense in its answer to Count I above.

Fourth Defense.

For further and separate defense to Count II it repeats the allegations of its Fourth Defense in its answer to Count I above.

Fifth Defense.

For further and separate defense to Count II it repeats the allegations of its Fifth Defense in its answer to Count I above.

Sixth Defense.

For further and separate defense to Count II it repeats the allegations of its Sixth Defense in its answer to Count I above.

Answer to Count III.

First Defense.

1. For answer to paragraph 1, it repeats the allegations of paragraphs 2, 3, 4, and 5 of the First Defense in its answer to Count I above.

[fol. 15] 2. For answer to paragraph 2 it admits that the plaintiff in her individual capacity was named as the beneficiary in Part I of the application dated February 25, 1955, referred to herein as Exhibit 2, but denies the allegations of said paragraph as to insurance.

3. It denies paragraph 3.

Second Defense.

For further and separate defense to Count III, it repeats the allegations of its Second Defense in its answer to Count I above.

Third Defense.

For further and separate defense to Count III, it repeats the allegations of its Third Defense in its answer to Count I above.

Fourth Defense.

For further and separate defense to Count III, it repeats the allegations of its Fourth Defense in its answer to Count I above.

Fifth Defense.

For further and separate defense to Count III, it repeats the allegations of its Fifth Defense in its answer to Count I above.

Answer to Count IV.

First Defense.

1. For answer to paragraph 1, it repeats the allegations of paragraphs 2, 3, 4, and 5 of its First Defense in its answer to Count I above.

2. For answer to paragraph 2, it repeats the allegations of paragraphs 2 to 8 inclusive of its First Defense in its answer to Count II above.

3. Answering paragraph 3, it admits that the plaintiff in her individual capacity was named as the beneficiary in Part I of the application dated February 25, 1955, referred to herein as Exhibit I, but denies the allegations of said paragraph as to insurance.

[fol. 16] 4. It denies paragraph 4.

Second Defense.

For further and separate defense to Count IV, it repeats the allegations of its Second Defense in its answer to Count I above.

Third Defense.

For further and separate defense to Count IV, it repeats the allegations of its Third Defense in its answer to Count I above.

Fourth Defense.

For further and separate defense to Count IV, it repeats the allegations of its Fourth Defense in its answer to Count I above.

Fifth Defense.

For further and separate defense to Count IV, it repeats the allegations of its Fifth Defense in its answer to Count I above.

Wherefore it prays that the petition be dismissed.

PHINEAS M. HENRY,

RALPH A. CHURCH,

LUTHER L. HILL, JR.,
Attorneys for Defendant,
1111 Equitable Building,
Des Moines 9, Iowa.

CONDITIONAL RECEIPT. DO NOT DESTROY.

RECEIVED Twenty One and 79/100 Dollars in connection with an
(Insert amount of cash or check)

Application made this day to the New England Mutual Life Insurance Company, of Boston, Massachusetts,

for Insurance of $ 10,500 on the life of W. Mark Hinkle
Insured's Name

The Insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft given in payment of this premium is not paid on presentation, this receipt shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Countersigned 2/25, 1955

Barbara Blevins Agent

Philip C Rayle Secretary

If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt the premium will be refunded.

EXHIBIT 1.

(p. 19)

EXHIBIT 2.

USE BLACK INK—WRITE LEGIBLY

Rodney Bliss, Jr.

(Print Name of Agent entitled to credit for this Application)

Agency Contract or Brokers Contract ☐

Persistency ☒ Supplementary Persistency ☐

R. Bliss, Jr. D
3-9-D
1/10/57

RODNEY BLISS, JR., General Agent
1010 Fleming Building
S. W. Cor. Sixth Avenue and
Walnut Street
DES MOINES 9, IOWA

The First Mutual Life Insurance Company Chartered in America

Part I—Application to the New England Mutual Life Insurance Company

For Insurance on the Life of W. Mary Hinkle

(Print names clearly as it should appear in the Policy)

1 Residence Address (Give No., Street, City, Zone No. and State) 4011 Grand Ave Des Moines 13, Ia.

2 Business Address (Give No., Street, City, Zone No. and State)

3 To whom and where are premium notices to be sent? Insured at Residence

(If Insured, give address; if other than Insured, give name and address)

4 Place of Birth (City or Town) Gilbert (State or Country) Ia.

5 Citizen of U. S. A.

6 Date of Birth (Month) Feb. (Day) 1 (Year) 12

7 Age nearest Birthday 42

8 Sex M

9 Single, married, widowed or divorced Married

10 Occupation (Be explicit) Secretary & Treasurer

11 Any change contemplated?

12 Employer D. W. Onthank Co.

13 Nature of Business

14 Insurance in force on life of Proposed Insured (If space inadequate, send memorandum)

Company	Year of Issue	Amount	Double Indemnity
Connecticut Mut	1954	3000	Incl.
National Service Life	5000	1942	

(If any of the above insurance is business insurance, so indicate.)

15 What other negotiations for life or disability insurance on the life of the Proposed Insured are pending or contemplated? (State fully.) None

16 In what countries outside the United States does the Proposed Insured intend to travel or reside? None

If going to make flights as a trainee, pilot or crew member,

Waiver of Premiums ☐
Double Indemnity ☐

18 Form of Insurance

19 Amount

20 Any special request

21 To whom payable (Give full name. If a Money or if Life Insurance is involved give date of birth. If a Corporation, name of State of Incorporation. Full names of all persons.)

Josephine B. Hinkle of 4011 Grand Ave Des Moines 13, Ia. surviving Children in equal shares

22 Relationship Wife of Insured

23 Is the right to change the beneficiary reserved in the Proposed Insurance? Yes

If not, to whom are ownership and control reserved? All rights to Insured

24 Apply Dividends under Option ____
(A Pay in cash; B Apply to reduce premiums; C Use to purchase paid-up additions; D Accumulate at interest.)
(Option C is not applicable to Term Policies or during term period of other policies.)

25 Is Automatic Premium Loan Provision elected, if available under the form of insurance applied for? ---

26 First Premium: Amount ☐
Semi-annual ☐☐
Quarterly ☐
(Check one.)

27 $ ____ paid agent on ____ (Date)
for first premium on insurance applied for.
(Settlement acceptable only on one of Company regular forms of payment plans)

Reserve for HOME OFFICE USE, for ADDITIONS and AMENDMENTS

No change shall be made as to Classification, Form of Insurance, Amount, or Benefits, unless agreed to in writing by me.

Chartered 1835

Chartered 1835

Chartered 1835

4 Place of Birth (City or Town) Gilbert (State or Country) S. | 5 Citizen of U.S.A.

6 Date of Birth (Month) Feb. (Day) 1 (Year) | 7 Age nearest Birthday 42 | 8 Sex M | 9 Single, married, widowed or divorced Married

10 Occupation (Be explicit) Insurance - Forest Engineer | 11 Any change contemplated?

12 Employer U. S. Smelting Co. | 13 Nature of Business

14 Insurance in force on life of Proposed Insured (If none inadequate, send memorandum)

Company	Year of Issue	Amount	Double Indemnity
Connecticut Mut	1954	3000	Accidental Death
National Service Life	1952	1000	

(If any of the above insurance is business insurance, so indicate.)

15 What other negotiations for life or disability insurance on the life of the Proposed Insured are pending or contemplated? (Specify.) None

16 In what countries outside the United States does the Proposed Insured intend to travel or reside? None

17 A Does the Proposed Insured plan to make flights as a student, pilot or crew member, or has he made such flights within 10 years? No

B Has flying time as a fare-paying passenger on scheduled airlines exceeded 100 hours in any of the last five years, or is it expected that it will exceed this figure in the next 12 months? No

C Has flying time as a passenger, other than as a fare-paying passenger on scheduled airlines, exceeded 25 hours in any of the last five years, or is it expected that it will exceed this figure in the next 12 months? No
(If answer to A, B or C is "Yes," complete Aviation Questionnaire.)

22 Relationship Employer - employee

23 Is the right to change the Beneficiary reserved in the Proposed Insurance? Yes
If not, so whom are ownership and interest reserved? [illegible] to husband insured

24 Apply Dividends under Option _____
(A Pay in cash; B Apply on reduce premiums; C Use to purchase paid-up additions; D Accumulate at interest.)
(Option C is not applicable to Term Policies or during term period of other policies.)

25 Is Automatic Premium Loan Provision elected, if available under the form of insurance applied for? —

26 First Premium: Annual ☐ Semi-annual ☐ Quarterly ☐ (Check one.)

27 $_____ paid herewith on _____ (Date) for first premium on insurance applied for. (Settlement acceptable only on one of Company regular forms of payment plans)

Reserve for HOME OFFICE USE, for ADDITIONS and AMENDMENTS

No change shall be made as to Classification, Form of Insurance, Amount, or Benefits, unless agreed to in writing by me.

It is Hereby Agreed that this Application, including Part II, a copy of which shall be attached to the Policy when issued, shall become a part of every Policy issued hereon; that acceptance of a Policy shall constitute ratification of any and all changes noted by the Company under "Additions and Amendments"; and that the insurance applied for shall take effect only if and when (a) this Application is approved by the Company at its Home Office, and (b) the first premium is paid while the Proposed Insured is in good health, provided there is then no change in the insurability of the Proposed Insured since the date hereof. If, however, the first premium is paid with this Application, and it is so stated in answer to Question 27, the insurance shall take effect as stipulated in the Conditional Receipt. The foregoing information is true and complete and is correctly recorded.

Witness _____ Date 2/25/1955 Wilmax Hinkle (Sign name in full) Proposed Insured.

Witness _____ Date _____ 19__ _____ (Sign name in full) Applicant for Insurance.

(Only one signature required if Proposed Insured and Applicant for Insurance are the same)

References

DO NOT WRITE BELOW THIS LINE EXCEPT AS INDICATED

Name	Address	

Chartered 1835

(p. 20)

Agent's Certificate

To be filled out and signed by the Agent or Broker

1. How long have you known the Proposed Insured?_____

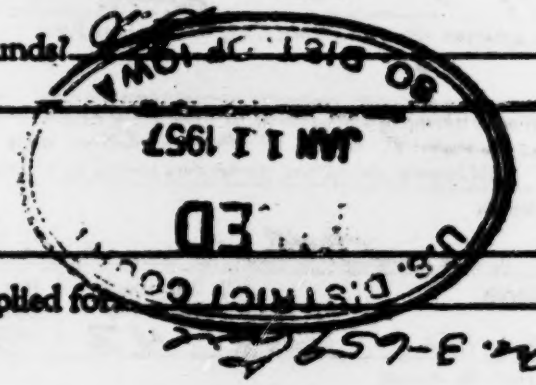
2. If Proposed Insured resides in the country: _____ miles in a _____ direction from _____ on _____ Road or Route.

3. If Proposed Insured changed his residence or business address within two years, give the last previous address and employer.
Resided at 3919 5th St. Seattle Wash. 1954:

4. If name of Proposed Insured has been changed within ten years by marriage or otherwise, give previous name.

5. Occupation. Give comprehensive description. (Use Occupation Blank freely as circumstances make advisable.)

6. Are premiums to be paid by a corporation, or from trust, guardianship or estate funds?_____
If so, are you submitting the required evidence of authority?_____



7. If Proposed Insured is a minor or a married woman:
   (a) Give full name and address of father or husband._____
   (b) If a minor, give names of brothers and sisters for whom insurance is being applied for._____
   (c) Who is paying for this insurance?_____
   (d) How much insurance is in force or applied for on life of father or husband? (If none, give reason.)

8. If Beneficiary is not a relative, nor a business partner or associate, explain fully the insurable interest.

9. If this is business insurance, give names of other business associates for whom insurance is being applied for._____

10. What is your estimate of Proposed Insured's financial worth? $_____ earned income? $_____
total income? $_____

11. Is the proposed insurance intended to replace any now carried in this or any other Company? (If so, state reasons and indicate Companies and form of insurance; if this Company, also give policy numbers and agency.)_____

12. Do you unqualifiedly recommend approval of the Application?_____

_____ 19____

_____
Agent
Broker

6. If Proposed Insured is a Minor or a Married Woman:

(a) Give full name and address of father or husband

(b) If a minor, give names of brothers and sisters for whom insurance is being applied for

(c) Who is paying for this insurance?

(d) How much insurance is in force or applied for on life of father or husband? (If none, give reason.)

8. If Beneficiary is not a relative, nor a business partner or associate, explain fully the insurable interest.

9. If this is business insurance, give names of other business associates for whom insurance is being applied for.

10. What is your estimate of Proposed Insured's financial worth? $ earned income? $ total income? $

11. Is the proposed insurance intended to replace any now carried in this or any other Company? (If so, state reasons and indicate Companies and form of insurance; if this Company, also give policy numbers and agency.)

12. Do you unqualifiedly recommend approval of the Application?

19 Agent

Check over every part of this Application before you send it to the Company. See that the Application and the Medical Report are clear, correct and complete.
Additional information regarding finances, purpose of insurance, dates of lapse and plans of other insurance, and other special items, are desirable and will help to avoid delay when a large amount of insurance is applied for or carried.

The attached slip indicating source of business must be completed.

General Agent's Certificate

1. What is this Agent's status? Full-time ✓ Part-time Agent of another Company Broker

2. Is the Agent licensed where this Application is written: for this Company? Yes for another Company?

as Broker?

19 55 Robert Bliss, Jr., General Agent

Instructions

1. Unless otherwise requested, credit for this business will be given to the person named above Part I. See that the correct name appears. If a firm, give also name of individual soliciting. The name credited in your monthly analysis of new business must coincide.
2. If the premium is paid on the date this Application is signed, the Policy will usually bear that date, if issued as applied for.
3. This Application is the property of the Company, to whom it must be returned after the medical examination is made and this application completed. It must not be withdrawn or destroyed.

[fol. 17] Reply.

(Filed in United States District Court, December 10, 1955)

(Title of Case)

Division I.

The Plaintiffs state that under the Iowa Rules of Civil Procedure new matter in an Answer stands admitted unless pleaded to by way of a Reply within seven days after the Answer is filed, and that there is no procedure in said Iowa Rules for pleading in case a cause is remanded by a Federal Court, and these Plaintiffs fear that should this case be remanded it would then be too late to file a Reply. And the Plaintiffs further state that under the Iowa law an estoppel cannot be relied upon unless specially pleaded, and Plaintiffs are not sufficiently informed as to whether such is substantive law of Iowa or is procedure law, and they fear that the Defendant will claim in this Court that such is substantive law of the state and thus exclude the Plaintiffs on all questions of estoppel, and because of both of the reasons above, and out of the abundance of precaution, these Plaintiffs file this as the separate Reply of each of them.

Division II.

Each Plaintiff separately states as her Reply to Defendant's Second Defense:

1. They deny paragraph 2.

2. As to paragraph 6, they deny that the date for medical examination was set at the request of Max Hinkle, and they state that the date of the examination was fixed [fol. 18] by agents of the Defendant for the Monday following the date of the contract, Exhibit A, and was not fixed for said date by any request of said Max Hinkle.

3. They further state that Monday, February 28, was fixed by all parties in the contract, more especially the Defendant.

4. That the interpretation Defendant put upon the clause in Exhibit A for "satisfactory evidence that pro-

posed insured is now insurable", etc., was that said clause meant a physical examination arranged by the Defendant. That Defendant arranged it for Monday, February 28.

Division III.

Each Plaintiff separately states as her Reply to the Third Defense pleaded by Defendants:

1. They deny paragraph 1 of said Third Defense.

2. That said paragraph 1 is an attempt to violate the Iowa law known as the parole evidence rule, and that such rule in Iowa is a rule of substantive law, and that the substantive law of Iowa precludes Defendants from varying the terms of the valid written contract sued upon and set out in the Petition.

3. That the contract sued upon was made and entered into in the State of Iowa.

4. That Defendant is estopped from asserting the facts stated in paragraph 3 of said Third Defense, because:

a. It permitted its agent Bliss to enter into said writing and caused the said Hinkle to believe, to the time of his death, that he was covered by this insurance as stated in the receipt issued.

b. In all of its dealings with the various attorneys mentioned in their Answer, said paragraph 3 is the first time the Defendant has ever asserted or claimed that its agent had no such authority, and is estopped from so claiming at this late date.

c. It ratified it by not asserting it as soon as it discovered what Bliss had done, and waived it by not asserting it at its earliest opportunity in dealing with and correspondence with Plaintiff.

Division IV.

Each Plaintiff states as her Reply to the Fourth Defense set out in the Answer:

1. They deny paragraph 1, and state that Max Hinkle signed a blank furnished by Defendant similar to that set

out as Defendant's Exhibit 2, but that if Exhibit 2 is the same paper he signed, the Defendant has altered the same and has made additions to it after the agent Bliss left Max Hinkle's presence and after said Hinkle signed it, and they deny that the answers shown on Exhibit 2 as Nos. 15, 16, and 17 were on said Exhibit at the time Max Hinkle signed it.

2. They deny the facts stated in paragraph 2.

[fol. 19] 3. They deny the facts stated in paragraph 3.

4. a. The Plaintiffs further state that Defendant is estopped from setting up as a defense the matters stated in their Fourth Defense and from using as against these Defendants any part of Exhibit 2, and from claiming that said Exhibit 2 is any part of the contract entered into, because they did not furnish or deliver to Max Hinkle any copy of said Exhibit 2, and that by the substantive law of Iowa an application is not a part of the insurance contract, and the insurance company is estopped from claiming that it is, unless they attach a copy thereof to the contract they deliver to the insured, and that the purpose of said Iowa law is to make it impossible for the insurance company to alter or add to such application after they learn of the death of the insured, and that the failure to attach and deliver to Max Hinkle a copy of said Exhibit 2 has led to detriment in this case, and that if they had delivered a copy it would then have been impossible to alter the original without positive detection; and by their failure to give him a copy of what he signed they have opened the door to all the detriment that has arisen in this case, and are thus estopped from using that instrument, Exhibit 2, when they had reserved to themselves that power to alter without positive detection.

b. and that regardless of estoppel, under the Iowa law an application for insurance is not a part of the contract unless the insurance company furnished the insured a copy of it attached to the contract.

c. That Defendants waived the defense pleaded as the Fourth Defense, by their conduct after they discovered the

facts they allege, and especially by paragraph 10 of their Second Defense.

5. Plaintiffs deny paragraph 5.

6. Plaintiffs deny paragraph 6.

Division V.

Each Plaintiff states as her separate Reply to the Fifth Defense set out in the Answer:

1. They deny that under the laws of Iowa section 508.28 Iowa Code means what Defendants assert in paragraph 1.

2. That if said section should mean what Defendants assert in their Answer, Defendants are estopped to rely thereon because of the following facts:

a. They have been engaged in the insurance business in Iowa since 1913, and Max Hinkle was inexperienced in the insurance business, and with a knowledge of the law they now claim they wilfully violated said law, and are estopped from claiming the benefit of their own wrong, and they printed on said receipt that the insurance was then in force, "irrespective of any subsequent casualty," they thus led Max Hinkle into the belief that he was covered by insurance and they caused him to continue under such belief and lured him into a sense of security until his death and until it was too late for him to protect himself.

[fol. 20] b. That for years prior to the date of this transaction Defendants have used in Iowa the blanks containing the words printed on Exhibit A and have interpreted it in connection with the laws of Iowa to mean that the insurance is effective as of the date of the application and when they issue the policies they so date them and word them so that the premium is payable as of the date of the application, not of the physical examination, and that if Defendants had issued a policy after an examination in this instance, they would have followed their usual practice and would have so worded the policy to collect a premium covering the period between the application and the physical examination,

and that it has been Defendants' habit in Iowa to so interpret such "Conditional Receipts" as to entitle them to make the annual premium due as of the date of the application, not the date of the examination, and Plaintiffs state that because of such interpretation of such contracts by Defendants and their acts of charging a premium during the period between the application date and the physical examination date, Defendants are now estopped to assert that the Iowa law means what they plead in this Answer that it means.

c. That if the said Iowa Code does mean what Defendants plead that it does, Defendants are estopped by the acts aforesaid from relying upon such law in that by their conduct aforesaid, if not estopped, the Court would enable them to charge a premium and claim the insurance was in force between the application date and the examination date, if the applicant lived, and to claim he had no insurance, if he was killed before the examination.

d. They have made a habit to collect for insurance after they find he lived, and thus did not need it for the intervening period, thus when events happen so that he did need insurance during the intervening period, they are estopped to claim he did not yet have it.

e. That Defendants prepared the blank forms such as Exhibit A, and wilfully so worded them that they can blow both hot and cold, that if the applicant lives and takes the examination they charge him a premium from the date of the application after they know he did not die in the meantime, but if he is killed in the meantime, they can deny the insurance ever existed, and they should be estopped from carrying out this wilful scheme in the instance where the insured gets killed and does need the insurance covering the intervening period. They are estopped from interpreting a contract to mean that if he lives and does not need the insurance for the few days, he has to pay for it, but if he is killed and thus does need it, he has not got it.

f. That Defendant and all other insurance companies have procured opinions of Courts on similar statutes as see-

tion 508.28, and when it comes to charging premiums from the date of the application, have contended: that the contract of insurance is valid when it contemplates an examination; that the validity of a contract is determined from the facts existing when it is made, not by what happens after- [fol. 21] wards, and if a contract contemplates an examination section 508.28 is complied with. That in contract law a contract valid when made is not rendered invalid by subsequent events which make performance of a condition impossible. Impossibility of performance of a condition in an aleatory contract, or in any contract where the condition is not the bargained for exchange, excuses the performance of the condition.

g. That Defendant is estopped to rely upon what it states in paragraph 1 as to its interpretation of the Statute of Iowa, for to reach the conclusion Defendant pleads, the following would be the process:

That a contract of insurance that contemplates an examination is void until after the physical examination, yet they can charge a premium for the insurance that the insured did not have over the period prior to the examination. The custom of charging premiums for that period is an admission, and an estoppel to deny, that that contract was a valid contract from the beginning.

h. Their interpretation pleaded is further in conflict with the general law of Iowa on the subject of contracts, namely, that the validity of a contract is determined from the date it is made, not by what inadvertently happens afterwards, and it is not the law of Iowa that when a man has a valid contract, and is later accidently killed, his accident dates back and makes his existing contract void. And Defendant should be estopped from placing such an estimate on the intelligence of the Courts of Iowa. Accidental death does not date back and make existing contracts of the victim void.

i. That section 508.28 does not make the policy void, is not Contract Law of Iowa, but a direction as to conduct of insurance companies, and a company that violates the conduct prescribed for it is not in a position to claim advantage

of its own wrong, and is estopped from setting up its own wrong as a defense. If the statute means what Defendants plead, Defendant wilfully violated the statute in issuing the contract, Exhibit A, and cannot now defeat that contract by pleading its own wrong.

3. They deny paragraph 3.

4. They deny paragraph 4.

Division VI.

Each Plaintiff separately states as her Reply to the Sixth Defense in the Answer:

1. To each repeated allegation in the Answer, and to allegation there by reference to prior parts of the Answer, the Plaintiffs state the same facts as herein stated with respect to the allegation where it first appeared in the Answer.

2. They deny that Max Hinkle executed Exhibit 2 as it appears in the Answer, and state that Defendants altered it after it was signed.

[fol. 22] 3. That Defendants are estopped from claiming any advantage to themselves as to Exhibit 2 for all the reasons heretofore pleaded, and that Defendants did not leave Max Hinkle a copy of Exhibit 2, and for said reason it was no part of the contract, and Defendants are estopped to so claim.

Each Plaintiff for her separate Reply to First Defense to Answer of Count II states:

1. To each fact stated in the Answer by way of reference the Plaintiffs state the facts applicable thereto heretofore stated herein.

2. As to paragraph 2, Plaintiffs state that the condition pleaded thereto in the Answer has been waived by the Defendants.

3. They deny paragraph 4, and state that the examination was set for Monday, February 28, at the request of an

agent of the Defendant; and that said date was fixed by the Defendants.

4. Answering paragraph 6, Plaintiffs state that it was impossible to take the physical examination on the date fixed by the Defendants, to-wit, February 28, 1955, by reason of the accidental death by crashing of his airplane of Max Hinkle, and as to the conclusion of law pleaded in paragraph 6, Plaintiffs state that in Iowa, as universally, impossibility of performance of a condition precedent at the time agreed for its performance, where the condition is not the bargained for exchange for the contract excuses the performance of the condition and makes its performance unnecessary, and creates liability irrespective of its performance. And Plaintiffs state that this contract was an alieatory contract, and in such contracts the insurance company is bargaining for the premium, not to get physical examinations taken.

Division VII.

As to the remaining divisions or numbered defenses in the Answer each Plaintiff separately states:

1. That each one is pleaded by Defendants by reference to some other part of the Answer, and as to each of such, Plaintiffs state the same facts as heretofore stated herein in Reply to the part of the Answer where it first appeared.

L. S. FORREST,
Attorney for Plaintiffs,
25 Law Building
at Drake University.

[fol. 23] Abstract of Evidence.

The case came on for trial before United States District Judge Albert L. Reeves and a jury on January 10, 1957, and the following proceedings were had:

Plaintiff's Evidence.

MAXINE K. HINKLE.

I was the wife of W. Max Hinkle and have lived in Des Moines four or five years. He was employed by G. W. Onthank Company as service manager.

I first saw Exhibit 1, on February 26, 1955, on the kitchen table. Mr. Hinkle left about 4 o'clock in the morning and I got up about 7 o'clock. He had gone out to the airport and was planning to go in his own plane to a meeting of the Marine Reserves in Lincoln, Nebraska. It was a regular trip every month and he always went by his own plane. About 8 o'clock my neighbors came and told me of his death.

About two weeks after the funeral Mr. Bliss called me. He said they wouldn't pay because he had not had a physical examination. I am the administratrix of W. Max Hinkle's estate.

Mr. Forrest: The plaintiff offers in Evidence Exhibit 1.

The Court: Received.

(Note. This is the conditional receipt set out as Exhibit A in the petition a photostatic copy of which appears in this Record as Exhibit 1 following the Answer. The original exhibit will be certified to this court.)

BERNICE HANSEN.

I have been employed by G. W. Onthank Company for six years and I was working in its office on February 25, [fol. 24] 1955. Mr. Hinkle's desk was about four feet from mine. Mr. Bliss in Mr. Hinkle's presence called Dr. Posner and asked if he could get in for an examination. He then said to Mr. Hinkle that they were unable to get him in that afternoon, the doctor couldn't take him and I heard him make the arrangement with Dr. Posner on the telephone that he come Monday morning. I couldn't say whether Mr. Hinkle said in so many words that he could take the examination that day, but I assume he did. To the best of my belief this was after lunch, because Mr. Hinkle soon left and I believe he left around 3 P. M. or 3:30.

Cross-Examination.

My desk was in the same room with Mr. Hinkle's and my back was to his. I was at work at my desk when Mr.

Bliss came in. I don't remember whether Mr. Hinkle told Mr. Bliss he was going away and was very busy that day. I wouldn't say he didn't or I wouldn't say he did. I was present during the whole conversation. I was about four feet away from Mr. Bliss when he was telephoning. I kept quiet during the telephone call. I would say Mr. Hinkle left his office for the day about an hour after Mr. Bliss left. I will swear that I did not hear Mr. Hinkle tell Mr. Bliss that he wanted this appointment arranged for Monday because he was busy that day.

Redirect Examination.

I was close enough that I could have heard it, yes, if he had said it. Mr. Hinkle and I sat with our backs to each other. There is just room enough between the backs of our chairs for a person to walk through, about two feet. I was sitting in my chair when Mr. Bliss was telephoning, and Mr. Hinkle was sitting at his desk. When Mr. Bliss was phoning he was standing about four feet from me, and Mr. Hinkle was about two feet from me. During the phone call I refrained from doing anything that would make any noise so that he couldn't hear. We were too close. My full attention was at nothing else other than being quiet during [fol. 25] the phone call, so therefore I had my mind on nothing else at that time. Yes, I was listening to everything both of them said. Mr. Bliss probably left about five minutes after the phone call.

Plaintiff Rests.

Defendant's Testimony.

Dr. Edward R. Posner.

I have been practicing medicine in Des Moines since 1905. I was medical examiner for the defendant company for about ten or twelve years which included February 1955, but I am not now.

I remember being called by Rodney Bliss on February 25, 1955, about a medical examination of W. Max Hinkle.

He asked if I could make an examination and I said "Yes" and he said: "Can you make it very shortly?" and I said I could, and before the conversation was over he said "Well the man says he can't have his examination today but he would like to defer it until Monday." So I made an appointment for Monday about 11 o'clock. I have a notation of that on my diary pad. Exhibit A-1 and Exhibit A-2 are my record for the examinations for that day. They are in my handwriting. It says 11 A. M. and the man's name was Hinkle and it was for New England Mutual.

Cross-Examination.

I have made hundreds of examinations for the New England Mutual, probably two or three a week. I did not make any others that week. There is nothing on the slip for February 25 because there was no appointment for that day. I have no record that the appointment was made on Friday, February 25, but I have a memory. I remember Hinkle's name because it is the name of a common pill and when I read Saturday morning about his accident, that's the first thing I connected with his name and I knew that I had an appointment with him on Monday. My tickets show that on the previous Wednesday I examined [fol. 26] C. W. Westerman for the Northwestern or Equitable. That is the date of the examination. I cannot give you the date the appointment was made. Turning to the pad, it shows the nearest examination I made to that was Mr. Cordell on the 7th of March. I cannot remember the day the insurance company made the appointment to examine Mr. Cordell. Here a slip for Tuesday, the 25th, shows that on that day I examined Mr. Phillips. I do not know what date the appointment was made for that. Sometimes they were made a week ahead of time. My son and an office girl are also in my office. I can't remember who they talked to for the other appointments mentioned. I was the head examiner for this company for Des Moines. Without my books I cannot tell you how much money they paid me in 1955 or 1956, and from my memory I cannot give the date when any other appointment was made besides Mr. Hinkle in 1955.

Exhibit A 1-2 was duly offered in evidence by defendant and admitted.

Exhibit A 1-2.

These are two small pieces of paper torn out of a diary pad by the witness. Exhibit A 1 bears the date of Monday, 28 February, 1955, with a calendar for January, February and March, and no handwriting. Exhibit A 2 immediately followed it in the pad and bears the printed date Monday, February 1955, at the bottom and the pencil notation: "11:30 A. M. Hinkle N. Eng. Mut."

RODNEY BLISS, JR.

I am general agent of the defendant company in Des Moines. Exhibit B is a copy of my general agent's contract with the company. I have been in the life insurance business ten years since the war and eight years prior to the war. I have been the head of the agency for eight years.

I did not know W. Max Hinkle before I telephoned him in his office. I got his name from a friend in the mortgage [fol. 27] business who told me he had a mortgage on his house. I went to his office on February 25, 1955, and I am quite positive it was 11 o'clock in the morning. I had a telephone conversation with him before I went over. I told him briefly how the plan worked, over the telephone.

(Note. The plaintiff objected to the testimony of this witness as to what he told Mr. Hinkle about the decreasing term policy as an attempt to vary the terms of a written instrument and objected to the testimony about the answer to question 17A in the application as to aviation because no copy of the application was delivered to the proposed insured as required by Iowa law. The Court said: "I will take care of it by instructions to the jury.")

The type of policy was a decreasing term policy. The purpose was to cover the mortgage on his home; in case he should not live long enough to pay for it out of his earnings, why the home would be clear should something happen to him and it is designed to cover the mortgage, but it goes down each year. When I talked to him we covered it

very thoroughly. I showed Mr. Hinkle the pamphlet marked Exhibit C. It explains how this decreasing term policy works. It gives the premium rate, annual, semi-annual and quarterly premiums. It also shows what the first year initial coverage will be under a ten, fifteen and twenty year plan. It shows how it goes down each year over a twenty year period. The minimum amount that may be purchased is ten units. Each unit is $1050, so ten units $10,500. Assuming ten units, at the end of the second year it was down to $10,000, third year $9500, fourth year $9000 and so on. At the end of twenty years there is still $1000 worth of coverage left and by that time the mortgage is supposed completely liquidated. So there is always enough coverage, a little bit more than the amount of the mortgage he has. I discussed the mortgage with him and this was the plan we decided would be the better for his purposes to cover this $10,500 mortgage.

[fol. 28] Exhibit D is Part I of an application for life insurance. It was signed by W. Max Hinkle in my presence. The handwriting aside from the signature is all mine. I asked him his address and wrote it down, the question 3 as to where premiums would be sent and he gave the answer written down here. I asked him where he was born and he told me Atlanta, Georgia. I asked him what country he was a citizen of and he said U.S.A. I wrote the answers to questions 4 and 5. I asked him his date of birth, age, sex, single or married, occupation, employer, insurance in force on his life and truthfully recorded all his answers. I asked him questions 15 and 16 and wrote down his answers. I asked him the question 17a "Does the proposed insured plan to make flights as a trainee, pilot or crew member or had he made such flights within ten years?" His answer was "No" and I wrote it down at that time and in his presence. I wrote down his answers to questions 17 B and C. I asked him to whom he wanted the insurance payable and he answered his wife Maxine K. Hinkle, as beneficiary, otherwise surviving children. I asked him if he wanted to reserve the right to change the beneficiary and he said "Yes" and I wrote it down. The application was signed by Mr. Hinkle after the answers had been inserted there in my handwriting.

The first premium on a quarterly basis at age 42 was $21.40 as explained in the pamphlet Exhibit C.

Exhibit E is a check written by Mr. Hinkle, dated 25 February 1955 made payable to New England Mutual Life Insurance Company in the sum of $21.70, the quarterly premium on this $10,500 decreasing policy.

The form of insurance and the amount and premium are not stated in the application. Quite often in writing an application there are certain questions. They are all important and you have to know the answers to every one, but those you already know in advance are not always completed in the presence of the prospect because you already know them. For instance the form of insurance; I knew [fol. 29] what it was. Mr. Hinkle knew what it was and it is left blank. The amount is left blank and there was a reason for that; I knew what it was and Mr. Hinkle knew what it was. The important and essential questions have all been asked.

I did not know that Mr. Hinkle was a licensed airplane pilot. I had no knowledge of his flying activities. I did not know he had made a number of flights in his own plane.

I told Mr. Hinkle about a medical examination. I told him it was necessary for him to be checked over.

It was then about 11 and I said "Could you come over today." He said "I think I probably could." I called Dr. Posner in the presence of Mr. Hinkle and asked him if he would be available about a quarter of twelve. He said "Yes, that would be fine." I put the phone down and asked Mr. Hinkle if that sounded all right. He said: "On second thought I would prefer that we put this off for a few days because I'm going away over the weekend." I said "Would Monday be all right?" He said: "That sounds fine." I talked to Dr. Posner and said: "Would 11:30 on Monday be o.k.?" Doctor Posner said: "Yes," Mr. Hinkle said "Yes" and the appointment was made very definite for Monday morning, 11:30, February 28.

Exhibit 1 has perforated edges and was originally a part of Exhibit D. I tore it off Exhibit D and handed it to Mr.

Hinkle. The handwriting is mine. There is no place on the receipt for showing the plan of insurance applied for. I wrote the words "Immediate Coverage."

(Note: The following was admitted over the following objection and ruling:

Mr. Forrest: Because it is an attempt to vary the terms of this written contract, and trying to make an oral contract out of this written one.

The Court: I will take care of it by instruction to the jury.)

[fol. 30] I made it a point of making it crystal clear to Mr. Hinkle that this was decreasing term insurance, that the $10,500 was not a permanent situation, and as I have explained to the court and jury it decreases each year. That is the reason why I wrote it in the receipt, I put that in so there would be no misunderstanding at all on the part of Mr. Hinkle. I told Mr. Hinkle why I put that in and wrote it out so there is no possible chance of any misunderstanding.

The next thing I found out about Mr. Hinkle was when I got a phone call Saturday night telling me of the unfortunate accident.

The check, Exhibit E, was not deposited in the bank. Shortly after Mr. Hinkle's death I had a call from a law firm of Mr. Nyemaster and Mr. McLaughlin who said they represented Mrs. Hinkle. Pursuant to that call I mailed them the application Exhibit D on March 7, 1955, with the letter, Exhibit F. Mr. Goode and Mr. McLaughlin who are associated with Mr. Nyemaster called on me on May 19, 1955, and I wrote the letter Exhibit G to Mrs. Hinkle on that date and enclosed the check, Exhibit E.

Mr. Henry: May it be stipulated that shortly before the filing of this suit the check was mailed by Mr. Forrest back to Mr. Bliss.

Mr. Forrest: Yes.

After a medical examination has been taken we require an inspection report from the Retail Credit Company. We ask for them through the agency office. We did not order an inspection report in this case because the application was not complete. An examination had not been made.

Exhibit H is the aviation questionnaire which must be completed on any applicant who plans to make flights as a trainee, pilot or crew member or has made such flights within ten years. It is the aviation questionnaire referred to in the application Exhibit D. If it discloses that the applicant is a pilot or officer or crew member of an aeroplane we explain to him that he has a choice of signing an aviation [fol. 31] amendment which would exclude aviation where he is acting as a pilot, officer or crew member and also tell him he can be covered if he is willing to pay an extra premium.

Exhibit I is the aviation amendment limiting aviation coverage. It is attached to the policy if the insured asks for it. If the insured is killed while piloting his own plane, the beneficiary is limited to the return of premiums. If the applicant says he doesn't want to pay an extra premium but wants the amendment we ask him to sign it. If I had known that Mr. Hinkle was a pilot flying his own plane I would have asked him whether he wanted the aviation rider or wanted to pay an extra premium. I believe that $3.75 a thousand was the extra premium at that time.

Defendant offered in evidence as part of the testimony of this witness Exhibits B, C, D, E, F, G, H and I.

[fol. 32] Exhibit B.

This is the general agency contract between Rodney Bliss, Jr. and the Appellant effective January 1, 1954. The only parts material to this action are the following:

General Agency Contract.

This Contract is made and entered into at Boston, Massachusetts by and between the New England Mutual Life Insurance Company of Boston, Massachusetts, hereinafter

called the Company, and Rodney Bliss, Jr. hereinafter called the General Agent.

The Company hereby appoints the General Agent as its General Agent for The State of Iowa, except the Counties of Clinton, Cedar, Johnson, Scott, Muscatine, Washington, Louisa, Des Moines, Henry and Lee, and the State of South Dakota, subject to the right of the Company to change the territorial lines specified, to appoint other agents in said territory or to discontinue doing business in all or any part thereof subject to the right of the Company to change the territory specified, to appoint other Agents and General Agents in said territory or to discontinue doing business in all or any part thereof.

The General Agent agrees that he will honestly and faithfully perform the regular duties of the General Agent, and will conform to the rules and instructions of the Company concerning its General Agencies. His duties shall include the appointment and training of Agents so that the Company will be adequately represented throughout his territory, the providing of service to Policyholders and the collection of premiums. It is agreed that the General Agent is an independent contractor and that nothing herein shall create the relationship of employer and employee.

[fol. 33]

Section 1.

Scope of Authority

The General Agent is hereby authorized to appoint and contract with Agents and Brokers, to procure, personally and through such Agents and Brokers, applications for policies and to forward them to the Home Office of the Company for consideration, and to deliver policies and premium receipts, upon payment of the amounts specified therein and upon compliance with the terms and conditions governing such delivery.

Section 2.

Limitation of Authority

The General Agent is expressly forbidden to make, alter or discharge any policies, contracts or agreements on behalf

of, or in the name of the Company, or to waive any forfeiture, or, except as otherwise agreed to in writing by a duly authorized officer of the Company, to incur any obligations or liability for which the Company shall be responsible.

[fol. 34] **Exhibit C.**

This is a pamphlet of 16 pages. On the front cover is the following:

Decreasing Term Policy

Premium Rates

Dividends computed on the 1955 Dividend Scale

January 1955

Minimum Policy — 10 Units

New England Mutual
Life Insurance Company

Boston, Massachusetts

The second page contains a description of the policy the material parts of which are as follows:

Decreasing Term Policy

Minimum Policy — 10 Units

This policy provides convertible decreasing term insurance for a period of 10, 15 or 20 years. The death benefit remains level during each policy year as shown in the table of death benefits on the following page. Premiums and dividends in this booklet are per unit of face amount. Premiums are payable throughout the entire term period. The policy has no cash values.

The initial death benefit is $1,050 per unit. The minimum amount issued will be ten units ($10,500 initial risk) . . .

The policy will be issued at ages 20 to 55 on the 10 year plan, 20 to 50 on the 15 year plan, and 20 to 45 on the 20 year plan. . . .

[fol. 35] The third page is headed

Death Benefits Per Unit.

It gives the death benefits payable under the 10 year plan, 15 year plan and 20 year plan. The death benefits under the 20 year plan are stated as follows:

20 Year Plan

Year	Death Benefit	Year	Death Benefit
1	$1,050	11	$550
2	1000	12	500
3	950	13	450
4	900	14	400
5	850	15	350
6	800	16	300
7	750	17	250
8	700	18	200
9	650	19	150
10	600	20	100

Then follows a series of tables showing gross premiums per unit at various ages. On the 9th page appears the following:

20 Year Plan.

Gross Premiums Per Unit.

Age 42	
8.46	Annusl
4.30	Semi.
2.17	Quar.
.74	Mo.

The remainder of the pamphlet contains Dividend Illustrations which are not material in this action.

Exhibit D.

This is Part I of the application for life insurance, photostatic copy of which marked Exhibit 1, follows the answer. This exhibit consisting of a front and back page will be certified to the court.

[fol. 36] Exhibit E.

This is a check reading as follows:

W. Max or Maxie Hinkle No. 194

4011--9th Street

Des Moines, Iowa, 25 Feb. 1955

Pay to the order of New England Mutual Life Ins. Co.
$21.70 Twenty One and 70/100.....Dollars

Central National Bank
and Trust Company
Des Moines, Iowa

(signed) W. MAX HINKLE,

Exhibit F.

March 7, 1955

M Ray Nyemaster
9th Floor Register & Tribune Bldg.
Des Moines, Iowa

Dear Mr. Nyemaster:

I am enclosing the application blank on Mr. Max Hinkle. You will note that the application blank is not complete, but does contain the essential information and was signed by Mr. Hinkle.

We will hold the check awaiting further instructions from you.

Sincerely,

RODNEY BLISS, JR.,
General Agent.

[fol. 37] Exhibit G.

New England Mutual

Life Insurance Company Boston 17, Massachusetts

Rodney Bliss, Jr., General Agent
1010 Fleming Building
Des Moines 9, Iowa

Phone: 3-5158

May 19, 1955

Mrs. W. Max Hinkle
4011 Ninth Street
Des Moines, Iowa

Dear Mrs. Hinkle:

I am returning the check which your husband gave me on February 25.

Mr. Goode and Mr. McLaughlin were in my office this morning, and they will assist you in every way possible pertaining to Social Security benefits, etc. I know that you are in good hands, but if there is any way at all in which I can help, be sure and let me know.

Sincerely,

(Sgd.) RODNEY BLISS, JR.

[fol. 38] Exhibit H.

New England Mutual Life Insurance Company
Boston, Massachusetts

Questionnaire on Aviation

This form must be submitted if the proposed insured:

1. Plans to make flights as a trainee, pilot or crew member, or has made such flights within ten years.

(2, 3 and 4 not material).

1. Complete this Schedule

Hours as Pilot, Co-Pilot or Student	Past 12 Months	Prior to 12 Months Ago	Next 12 Months
Scheduled Airlines			
Company-owned Plane, Business Flying			
Charter, Sightseeing			
Private Planes			
Military Planes (If this section applies, also answer #9 below.)			
Student Instructor			
Student (Dual)			
Student (Solo)			
Other (Describe under Remarks			
Totals			

2. (a) Have you ever held a pilot's license or certificate?

.....

(b) Types .....

(c) Date of Issue.....(e) Last Renewal Date.....

(d) Is it now in force?...(f) Expiration Date .....

3. Have you flown or will you fly outside the United States or Canada? .....

4. Have you ever been grounded, fined or reprimanded for violation of any regulation? .....

5. Have you ever had an accident in a plane which you were piloting? .....

[fol. 39]

6. Are you a member of any air force or reserve thereof or do you belong to a flying or glider club? .....

7. Do you own or intend to own any aircraft? .....

8. Do you intend to pilot or take pilot instruction in the future? .....

9. Are you a jet fighter pilot? .....

10. On what date did you last pilot?

Month..... Year .....

Remarks: If any question 3 to 9 inclusive is answered in the affirmative, give full details here:

Witness..... Date..... 19....

Proposed

.....Insured.

(Sign name in full)

Notice to Agent: If insurance with aviation coverage cannot be issued at standard rates, is

( ) full coverage with extra premium, or

( ) standard rate with aviation exclusion, desired?

[fol. 40] Exhibit I.

New England Mutual Life Insurance Company

Boston 17, Massachusetts

Amendment Limiting Aviation Coverage

It is hereby agreed, and this Policy is issued upon the express condition, notwithstanding any contrary provision contained therein, that if the death of the Insured results from travel or flight in or descent from or with any kind of aircraft:

(1) operated for any training or testing or experimental purpose, or

(2) of which the Insured is acting as a pilot, officer or as a member of the crew,

the liability of the Company under this Policy and under any paid-up or extended insurance and under any Policy issued in exchange for this Policy, shall be limited to (a) premiums paid to the Company, less all dividends credited in any manner, or (b) the reserve on this Policy, whichever is greater. In either case the amount payable will be increased by the reserve for any additions and accumulated surplus, and decreased by any indebtedness which has not been repaid in cash, and by any amount allowed as a credit in connection with a change or reduction. In no event shall the liability of the Company exceed the amount which would be payable if this Amendment were not in effect.

The Incontestable Provision in this Policy is hereby amended by the addition of the phrase "and except as to any provision contained in the Aviation Amendment."

As part consideration for insurance in the New England Mutual Life Insurance Company, application for which is dated....., it is further agreed

that the foregoing provisions shall be an amendment to and form a part of said application and of any and every Policy issued pursuant thereto, and that they shall be binding on any person who shall have or claim any interest under any such Policy.

New England Mutual Life Insurance Company

Philip C. Raye, Secretary O. Kelley Anderson, President

[fol. 41]

Signed in my presence this....day of.....19...

.....
Agent.

.....
Sign name in full Proposed Insured.

.....
Sign name in full Applicant for Insurance.

Only one signature required if Proposed Insured and Applicant for Insurance are the same.

Attached as of the date of issue to Policy No.

App.-467-49

[fol. 42] Cross-Examination.

To the best of my recollection I was sitting on the left and beside of Mr. Hinkle when I filled out Exhibit D. I assume I was writing on his desk. I don't remember whether I wrote on a pull board that pulls out of the desk. I believe the desk was against the south wall. To sit at it one faced south. I was sitting to the left of Mr. Hinkle, as I recall. I am not certain whether I was writing with the paper on his desk or whether it was on the pull out board.

The company asked me about some of the questions that weren't filled out in Exhibit D. I wrote back and explained

that quite often I might not fill out each single question on the application because of those I already knew. There is no need of putting them down in the presence of the prospect. Before it goes into the home office every question must be answered.

It is not a fact that after Mr. Hinkle signed Exhibit D I added some other information to it after I got back to my office. I did not write anything on it after I left Mr. Hinkle's office.

I did not know that Bob Evans was in the next room and that he owned a half interest in the airplane and was in hearing distance. It is not possible that I left the aviation answers to fill out later.

It was not my training to get the name on the dotted line and get away as quick as I could before they changed their minds. In any selling business getting the customer's name on the dotted line is an absolute essential. It is not true that I got the name on the dotted line and got out of there as fast as I could. At times I have filled out every question except a few non-essentials that I needed the answer to. I have never waited to fill out any question as important as aviation until I got back to the office. I have written life insurance on people that fly airplanes, but [fol. 43] I honestly can't tell you how many times. I asked Mr. Hinkle the questions. I would guess I had written five applications in 1955 on people who answered the aviation question in the affirmative. My best estimate is that I filled out personally about 35 applications in all in 1955. I can't give you their names. I asked Mr. Hinkle what life insurance he had and wrote down Connecticut General and National Service Life. As to the Service Life I probably might have assumed that he had ten thousand and then changed it to five because most service men had ten. So that is obviously what happened, where the big "5" is over the top of the "10". I maybe thought and changed it to five.

DOANE ARNOLD.

I am second vice president of the defendant company. My duties are underwriting of selection of risks, approving

or declining or rating applications sent in by our agencies throughout the country. I am 51 years old and have been second vice-president since 1952 and employed in the same department for 26 years. In my division the records of applications received are kept, and in an adjoining one we have records of all policies issued and now in force. I have made a search of the files and no application by W. Max Hinkle of Des Moines was ever received at the home office.

I am familiar with the underwriting rules and practices of the company. If the aviation question 17a in the application, Exhibit D, is answered "yes" under the rules of the company it is then necessary to complete an aviation questionnaire, Exhibit H, giving us complete information as to the type and amount of flying the insured has done and submit it to the home office. At the bottom of the form is a notice to the agent reading: "If insurance with aviation cannot be issued at standard rates, is", and a block to be checked, "full coverage with extra premium", and a second block "standard rate with aviation exclusion desired?" By aviation exclusion I mean a rider which excludes death as a result of flight when the insured is a pilot. [fol. 44] Exhibit I is the form limiting aviation coverage in use in February, 1955. It contains a blank for the signature of the proposed insured. If he says he doesn't want that, we issue a policy with an appropriate extra premium to cover the particular aviation hazard involved. For private pilots flying their own plane $3.75 per thousand per year was the extra premium in February 1955. If Mr. Hinkle's aviation record had been disclosed in the aviation questionnaire a policy would not have been issued without an extra rating or without the limited aviation coverage.

In underwriting risks we try to supplement the information received from the application by a form of inspection report from Retail Credit Company. Exhibit J is the special narrative life report on which they complete the results of their investigation and inspection on applications for more than $10,000. Question 7 on this form says: "Any past or present aviation interest" and down further under instructions to the investigator it says "Any past or present interest or activity in aviation." Under the rules and underwriting practices of the company, we cannot give the

application final approval until the inspection report has been received.

If the application Exhibit D had gone in and assuming a medical examination had been had, a Retail Credit report disclosed an aviation record such as Mr. Hinkle's, the policy would not have been issued as applied for without further investigation at least. We would have gone back to our agency and asked for the aviation questionnaire to develop the true facts, and then if they had been developed as the record here shows they were, we would have offered to issue either with an extra premium or with an aviation exclusion clause.

Under the underwriting rules and practices of the company, it does not issue life insurance policies in excess of $10,000 in Iowa without a medical examination.

[fol. 45] Defendant offered in evidence Exhibit J.

Exhibit J.

This is a blank form of report used by Retail Credit Company, and headed "Special Narrative Life Report." It contains blanks for filling in the answers to twenty-seven questions as to occupation, income, illness, operation or injury, use of intoxicants, family history, reputation, etc., including

7. Any past or present aviation interest?

25. Aviation-Recreation. Any past or present activity in aviation-hazardous sports.

Cross-Examination.

If a man owns an aeroplane and answers the questions regarding aviation in Exhibit D in the affirmative, he would be eligible for every plan of insurance we have with either an aviation exclusion rider or it would cost him a little more money.

It is the agent's job to send in the application and the medical examination. We frequently issue policies when

the examination was not on the same day the application was taken. Very frequently it is on the same day. The premium date is not necessarily the date of the application. It may be one and the same. Some occasions yes our company does issue policies and make the due date of the premium the same date as the application.

It is not within my purview but I am sure we have filed a sample policy with the Iowa insurance commissioner. It is required to do business in this State.

The policy shows the policy anniversary. It is not in every case the date we issue the policy. Our policies could have a due date of premium which is the same date as the date we issued the policy or the date the application was made. If we had issued a policy in this case we probably would have made the due date of the premium the date of the application. Sometimes we make the due date the same date as the application. If the medical examination in this [fol. 46] case had been satisfactory and had been sent in and if it were completed within a very short space of time we would have issued it and made it the date of the application. If it had been made on this Monday following the application and had gone through, the due date of the premium would have been the date of the application.

[fol. 47] Stipulation.

Mr. Henry: It is stipulated and agreed that the following facts are true and correct, subject to objection on the part of the plaintiff as to the relevancy and materiality thereof.

That W. Max Hinkle, the decedent referred to in the petition, obtained a pilot's license from the Civil Aeronautics Administration on November 14, 1946, to pilot an aeroplane and that he held it until the time of his death; that he owned in partnership with others a Luscombe aeroplane from the spring of 1951 until August 1952; that he owned a Cessna aeroplane in partnership with others from

August, 1952, until the fall of 1953; that he owned another Cessna aeroplane in partnership with others from the fall of 1953 until the fall of 1954; that he purchased a Swift twoseater aeroplane in the fall of 1954 in partnership with one Robert Evans; that while flying this Swift aeroplane on February 26, 1955, the plane crashed near Commerce, Iowa, and he was killed; that he piloted a plane from the Municipal Airport in Des Moines every Sunday when weather permitted and that he had made numerous flights to various parts of the United States as a flyer within the eight years prior to his death; that when he applied for a pilot's license in December, 1954, he reported a total flying time of 1450 hours as a pilot, 43 of which occuring during the last six months of 1954.

By agreement of counsel, the certificate Exhibit K of the Civil Aeronautics Administration was put in the record.

[fol. 48] Exhibit K.

Department of Commerce

Washington, November 18, 1955

I hereby certify that..... according to the records in the Medical Division, CAA, Washington, D.C., William Max Hinkle was issued a Class 2 CAA medical certificated dated December 28, 1954, by Dr. Harry Burns of Des Moines, Iowa. William Max Hinkle on the date of examination claimed a total flying time of 1450 hours (43 of these during the six months prior to the examination).

Sgd. W. R. STOVALL,
Chief, Medical Division
(Official title)

Office of the Secretary.

I hereby certify that W. R. Stovall, M.D., signed the foregoing certificate, is now, and was at the time of signing, Chief, Medical Division, Civil Aeronautics Administration,

and that full faith and credit should be given his certificate as such.

In Witness Whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this eighteenth day of November, one thousand nine hundred and fifty-five.

For the Secretary of Commerce:

Sgd. W. M. MARTIN,
Administrative Officer.

[fol. 49] ROBERT W. MUSTARD.

I am manager of the Des Moines office of Retail Credit Company. The biggest part of our business is to furnish reports on applicants for life insurance to various companies. We furnish reports on applicants to the defendant. The orders come from the local general agency or may be ordered from the home office. Exhibit J is the blank form used for report on all applications of $10,000 or over.

Question 7 asks "Any past or present aviation interest?" and Par. 25, a narrative paragraph, covers the general heading "Aviation-Recreation" and we cover any past or present interest in aviation. We require our investigator to contact at least four people who have known the man for five years, employers, former employers, friends, neighbors and sometimes the person himself and ask about duties, activities, and aviation—if they have been a pilot, about how much flying they do, how many hours they put in, whether a pilot in the service, whether in the Air Corps, Naval Air Corps Reserve, Marine Air Corps Reserve, whether they fly on weekends and so forth.

Cross-Examination.

I don't know how many reports we made for the defendant in 1955. The records are at the home office in Atlanta,

Georgia. In every investigation we try to find out if the applicant is in any way involved in aviation.

Defendant Rests.

[fol. 50] Plaintiff's Redirect Evidence.

ROBERT HARRIS EVANS.

1432 Paytone Ave., Des Moines, 30 years old, lived in Des Moines all my life except during my military service. I have been employed for seven years by G. W. Onthank Company and was on duty on February 25, 1955. My bench was about fifteen feet through a partition from his desk, and there was an open door in the partition. Mr. Hinkle's office was about six feet by eight feet.

I was in my place of work on February 25, 1955. I passed through Mr. Hinkle's office several times while Mr. Bliss was there. He had his overcoat on as I recall and some kind of briefcase there on the desk. Max was sitting up at his desk facing more or less south. Mr. Bliss was sitting on his right hand, west side, of the outside of the desk area. It is extremely crowded. I occupy the same area right at the present and there isn't much room to work. Max kept his desk rather full of stuff. He had a ham radio receiver there, telephone, dictaphone, file basket and various papers, and didn't have very much room for anything else. Mr. Bliss was sitting on Mr. Hinkle's right filling out a form on a small pull tab that slid out of the desk. Mr. Hinkle's desk was crowded and it is doubtful if there was room to write with the paper on the desk. I didn't hear anything that was said by Bliss and Mr. Hinkle, probably a word or two, probably wouldn't have made any continuity out of it.

Max Hinkle's airplane activities were more or less of a hobby. He went in for it quite strongly. I actually own about forty per cent of the airplane. We had had several of them in the course of approximately five years. We started out back when I was first employed with the Onthank Company, and three of us bought an airplane in

shares. One of the other fellows dropped out. Everybody knew he flew. He took practically everybody up in the building except possibly some of the higher managerial [fol. 51] personnel around there, but the office girls had all been up with him. Everybody in the service department. Some of them had flown to Chicago with him, around the state on service calls and to Cedar Rapids, we would fly, it was quicker. I knew him quite well, intimately. We were together socially quite a bit.

MRS. BERNIECE HANSEN.

I am the same Mrs. Hansen who testified yesterday. I don't recall leaving my desk while Mr. Bliss was there. I was there when he came and when he left. I did not hear Mr. Bliss ask Mr. Hinkle any question about aviation, or hear Mr. Bliss say anything at all about aviation.

I had known of Mr. Hinkle's flying activities for six years and had flown with him. I knew he flew practically every Sunday morning and flew to Omaha in an airplane. To the best of my recollection I did not hear aviation mentioned by either Mr. Bliss or Mr. Hinkle.

I saw Mr. Bliss writing on a little pull out section of Mr. Hinkle's desk on the right of Mr. Hinkle. The pull out board was on the west side of the desk, just a little space about the size of a sheet of paper, pulls out, and anybody writing on it would have to be sitting back a little bit, and there isn't too much room.

Cross-Examination.

I testified yesterday that I didn't pay much attention to the conversation between Mr. Bliss and Mr. Hinkle until Mr. Bliss picked up the telephone. In that small area it is impossible not to be aware of a conversation going on. Unless there is something that draws your particular attention you are not going to be alert to everything that is said.

Plaintiff Rests.

[fol. 52] Motion to Require the Plaintiff to Elect Between the Counts of Her Petition.

Mr. Henry: I move that the court require the plaintiff to elect which count she is now suing on because obviously she can't recover $42,000.

The Court: No, sir, only one recovery, and I think so far as the proof is concerned, if she is entitled to recover it would be in her individual capacity and not in her representative capacity. The testimony was she was named as the beneficiary.

Mr. Forrest: In view of the answer . . . . Mr. Henry replied that if she has any right to recover it is in her individual capacity, so in view of that answer I would concede that he is correct in his answer.

The Court: Well in the inspection of the petition if she is entitled to recover it would be on the fourth count. What do you have to say about that?

Mr. Forrest: But he surely can't make me elect between Counts III and IV. I think I have a right to submit both III and IV . . . . As long as "immediate coverage" is written in there, we have a right to disregard all those conditional things and treat it as exactly what it says, a contract of immediate coverage . . . . I understand that in any civil action the court can submit every count and all the things that are claimed in each count and then tell the jury: "However if you find on the first count, find $10,500; if you don't find on that one, then consider the second one, but you can't find but $10,500 altogether."

The Court: You make averments of the first count. You adopt them in your fourth count. You adopt the averments of your first count in the fourth count.

Mr. Forrest: Well I don't really care how it's submitted, so it is submitted to the jury.

[fol. 53] Ruling on Motion for Election.

After further colloquy between the Court and counsel, Mr. Forrest requesting that it be submitted as a contract

for immediate coverage without any conditions as one theory, the Court ruled:

The Court: The case submitted to the jury will be on the fourth count.

[fol. 54] At the close of the evidence the defendant moved the court to direct a verdict in its favor as follows:

Motion for Directed Verdict.

Now then at the close of the evidence the defendant moves the court to direct the jury to return a verdict for the defendant on Count IV of the petition on the following grounds:

1. The conditional receipt offered in evidence, and alleged to be a contract of insurance is not a contract, but a receipt delivered to evidence the payment of a first premium in connection with an application for life insurance, and the terms upon which the first premium was paid. It was merely a part of a transaction which constituted an application for life insurance. Said application was not completed and was not accepted by the defendant, and there was no meeting of the minds of the parties to form a contract.

[fol. 55] 2. The said conditional receipt was conditioned upon the receipt of satisfactory evidence at the home office in Boston that the proposed insured was insurable for the amount, plan and rating applied for. It appears from the record that no such evidence was sent to the home office of the defendant at Boston or received by it there, and in fact, no such evidence could have been furnished by the proposed insured in view of his aviation record.

3. The conditional receipt contemplated and expressly provided in the third clause of the printed matter therein "If the company determines that the proposed insured is not so insurable, said application shall be declined and the amount paid will be refunded upon return of this receipt."

This provision requires and contemplates a determination by the company as to the insurability of the proposed insured for the amount, plan and rating applied for, and, provided that, if the company determines that the proposed insured is not so insurable, the application will be declined; that this provision negatives the construction of the receipt as being in itself a contract for temporary insurance.

4. The insertion of the words "immediate coverage" below the amount of insurance applied for in the conditional receipt does not convert the receipt into a contract of temporary insurance in view of the fact that a decreasing term policy was applied for, and the proposed insured was advised that the amount of insurance in the first year was $10,500, and would decrease annually thereafter.

5. If said receipt is construed to be a contract of insurance because of the addition of the words "immediate coverage" under the amount of insurance applied for, said contract is not binding on the defendant because the agent, Bliss, had no authority to make, alter or discharge any policies, contracts or agreements on behalf of or in the name of the company, or, to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the company, to incur any obligations or liability for which the company should be responsible.

[fol. 56] 6. If said receipt is construed to be a contract of insurance, it is not a valid contract under the laws of Iowa because the defendant was prohibited by the statutes of Iowa from issuing contracts of insurance in an amount more than $10,000 without a medical examination duly passed and approved by the medical examiner or the medical board of the company. Section 508.28 of the Code of Iowa, 1954, requires or contains this language: "The Commissioner of Insurance shall decline to approve any form of policy unless issuance is based upon the satisfactory medical examination of applicant by a physician, and no policy or contract shall be issued by any insurance company to any individual until such examination has been passed and duly approved by the medical examiner or the medical board of the company." And then in a subsequent section

there is a provision that non-medical insurance may be issued up to $10,000.

7. It appears from the record that there was no medical examination because of failure of the proposed insured to have an examination. Therefore, he failed to furnish an application upon which the defendant, under the law of Iowa, could insure his life for $10,500.

8. It appears from the evidence that the proposed insured was informed that a medical examination was necessary in connection with his application for life insurance. His failure to take said medical examination, as shown by the record, was not due to any act or neglect on the part of defendant, and there is no evidence that said medical examination was waived by the defendant.

9. It appears from the evidence that because of the proposed insured's aviation record, he was not insurable for the plan and rating applied for under the defendant's underwriting rules and practices. Regardless of whether the answer to Question 17(a) in the application was written by the agent before or after the proposed insured signed the application, if he had answered "yes" to said question he was not insurable for the plan and rating applied for.

[fol. 57] After oral argument by counsel for the defendant and the plaintiff, the following colloquy took place between the court and counsel for the defendant:

Mr. Henry: That is a point I didn't cover in my brief, and I think perhaps your honor and I don't see with the same eye, and I can submit authorities over the noon hour, I think, to prove to your honor that insurability does not mean good health alone. That is why they get the retail credit report. It means habits. It means does he take drugs? Is he a drinker? Has he got a family history of insanity?

The Court: I understand that, but it is the law that insurability and good health are practically synonymous.

Mr. Henry: Yes, but it means more than insurability. That he can't be insurable--

The Court: (Interposing) I understand it is the physical condition of the insured.

Mr. Henry: And his history.

The Court: He may have had bad credit, you know.

The Court: Suppose he passed a perfect physical examination, but he is a dipsomaniac, they won't insure him because of his habit.

The Court: If I may say, that the insurability means the condition of good health.

Mr. Henry: I think the courts have held more.

The Court: I understand all the details, and that is correct, but I say the courts have said those terms are practically synonymous.

Mr. Henry: I would like to say this about the construction of this contract, because I think that is what your honor has in mind. Now, let's forget about anything said about good health. If Mr. Hinkle had taken his medical examination on Friday and had been passed by the medi-
[fol. 58] cal examiner, even though the application had not been mailed to Boston and then he had been killed in an automobile accident, no question about aviation record, the company would have paid the claim.

The Court: No, sir, not under your contention.

Mr. Henry: Yes, sir, I think it would, because he was insurable at the time of the application.

The Court: They must determine at Boston whether he was insurable.

Ruling on Motion for Directed Verdict.

The Court: The demurrer to the testimony is overruled or the motion to dismiss, whatever we may designate it and the only issue before the jury will be the question as to whether or not he was in good health at the time this conditional receipt was given him.

Mr. Henry: May I submit, your honor, that there isn't any evidence at all about that in the case.

The Court: Well I think there is. I think the jury would be justified in taking all the facts in the case.

[fol. 59] The Court thereupon gave the following oral instructions to the jury.

(Court's Instructions to the Jury)

Ladies and gentlemen of the jury, in the first place, I desire to very sincerely thank each and every one of you for the very careful attention that you have given to the testimony adduced in this trial. At the beginning of my charge I should say to you that the law of the case you have nothing to do with. It is the duty of the judge, at the conclusion of all the evidence, when counsel have finished their arguments, to instruct the jury on the law of the case, and I should tell you that with the law of the case you have nothing to do. It is your duty to accept the law as I may declare it and apply the principles of law so declared in your deliberations. This is the rule. Even though you should be of the opinion that I am not accurate on the law, nevertheless, there are tribunals for correction of any mistakes that I might make, and the jury is not that tribunal, so it is your duty to accept the law as I may declare it to you. On the other hand, with the facts of the case I have nothing to do.

Now it is true that I may, and I shall review the evidence in the case, and in doing that I might express opinions upon the evidence and I may recall the testimony differently from the way in which you remember it. If and when I do that, if any recollection of the evidence should not coincide with yours then it would be your duty to follow your own recollection and not mine. If any opinions that I might express upon the evidence should differ from yours then it would be your duty to follow your own opin-

ions and not my opinions. Nothing that I say to a jury, or say to you on the subject of evidence is binding upon the jury, whereas, everything I say to you on the [the] subject of law is binding on the jury. And when you go to your jury room you should, and I am sure you will, go there in the same spirit of fairness and impartiality that characterized you when you qualified as jurors in the case.

[fol. 60] At no stage of the lawsuit should either the court or the jury become inflamed with passion or prejudice, because as you know, when we have an emotional upsurge it is like a fog before our physical eyes. It dims our vision and we cannot see things clearly, and of all people in the world who ought to see things clearly it ought to be judges and jurors, because we are dealing with one of the most sensitive things in the world, and that is justice, and we can't do justice unless we know the facts and see them clearly, without bias and without prejudice.

Again, the issues in this case—I say, again the issues in this case are not complex, but on the contrary, they are very simple, and the issue that is about to be submitted to you is a very simple issue. You understand as far as the contract is concerned, or contracts, it is the duty of the court as a ma'ter of law to tell you what a contract is. It is the jury's duty to tell what the facts are.

Now to simplify the issues, and in saying it, my duty is to simply the issues. I must not be put in the category of intimating that able counsel in the case have made the issues complex. They have not done that. For them, I think they have diligently and ably brought to the jury and to the court all the facts in the case as they saw them and as they believed them to exist, and for which they are to be commended and to be thanked by you and by me for their diligence in doing that.

The facts in the case, if I may state what the facts are, and most of them are undisputed—as you understood, the defendant insurance company is a great and I'll say commendable insurance company. It has the confidence of the

Insurance Department of the State of Iowa, or did have, which licensed it to do business in the State of Iowa on the theory that it would deal honestly and fairly with its citizens. It would not have licensed it if it had a record of doing otherwise.

[fol. 61] On the 25th of February, 1955, and there is no dispute about that, Mr. Hinkle, the deceased, that is, the insured, if he were insured, the husband of the plaintiff, Mrs. Hinkle, was solicited by Mr. Bliss for insurance; that Mr. Bliss had a right to solicit him for insurance. That was his business. It was a legitimate business, and he had a right to do that. I'm speaking about that so that we will have no thought in our minds that something was done that ought not to have been done. Mr. Bliss approached him, as he had a right to do, for a contract of insurance. And it was agreed between them that the policy of insurance be taken out in the defendant insurance company and that the amount should be $10,500, and that I inferred from all the testimony that Mr. Hinkle had a mortgage on his property, on his home, and the policy was so drawn, or was to be so drawn that with the payment of the mortgage the amount of insurance would decrease. Now the object of that—I don't need to tell this very fine and intelligent jury that the object of that was that if anything happened to him then Mrs. Hinkle would have the benefit of an insurance policy that would discharge the mortgage on her home so that it would be free. A very commendable attitude on the part of the husband in seeking to protect his wife against a debt that might hang over her home in the event that he should pass on. Now there is no question about that conversation, no question but that at that time Mr. Hinkle gave a check for the amount of money that is named, $21.70, in payment of the insurance, and then when that was done Mr. Bliss then delivered to him, and there is no question about that, no controversy about it, gave to him what has been designated and shown to you as a conditional receipt.

Now then, it is the duty of the court to speak about the conditional receipt as a condition precedent to instructing

you further on the law. That conditional receipt, if I may say, an application was signed, certain statements were made on the application which I regard are of no import-
[fol. 62] ance whatever to the jury because that conditional receipt contained this recital: "Received Twenty-one and seventy hundredths dollars in connection with an application made this date to the New England Mutual Life Insurance Company." In connection with it. The application did not become a part of the receipt. It was only given in connection with it. Whatever statements were made in the application were not warranties, were not guarantees, were not anything, but just in connection with that this conditional receipt was given. Now then, you are interested in knowing what the recital was—conditional receipt was that—it says "application made this date." That is the receipt—"$21.70 in connection with an application made this date to the New England Mutual Life Insurance Company of Boston, Massachusetts for insurance of $10,500 on the life of W. Max Hinkle." Then that is the end of the sentence. Now let's see what the further recital was. "The insurance applied for"—"The insurance applied for," not the insurance written, but the "insurance applied for shall be in full force and effect from this date." Now there was a condition there, and that's where you are going to be called upon to say whether that condition was fulfilled—"provided the proposed insured", not the insured, but the proposed insured, "is now in good health." Now those words are easily understood. I repeat this: "The insurance applied for shall be in full force and effect from this date, provided the proposed insured," not the insured, but the proposed insured, "is now in good health." And then it says, "not withstanding"—that is true, "not withstanding any change in the proposed insured's health." In other words, he might become ill tomorrow, but if he is in good health today then this insurance is in force, this proposed insurance is in force; not the policy, but the proposed insurance is in force. "Notwithstanding any change in the proposed insured's health or condition due to disease hereafter acquired, or to any subsequent casualty."

[fol. 63] Now, "casualty," as I understand, means an accident, or if something would happen. So that the arrangement that apparently was made at that time as far as the proposed insurance was concerned, as I construe this contract, the insurance company meant to say to this man, "If you take this policy we will give you temporary insurance until we have tested your insurability, and then if you are not insurable," not a question, they say, "we will give it to you if you are in good health, and the insurance will be in effect if you are in good health at the time you apply for the insurance, and then we will take time to test your insurability and it may be that later on we will not issue the policy." It is just proposed insurance. But in the meantime the company says, "We will give you insurance. Now then, you say to me, and I don't need to instruct you as to my reasoning in the case, but if that were not true, as contended by able counsel in the case, that the insurance is not effective until a policy was delivered, that is not the terms of the contract. The terms of this conditional receipt are that the insurance is in force now because of proposed insurance, and if it were not, and had to await the final determination of the insurability of the applicant then there was no insurance in force at all. What was the object of making this recital except that while the policy was being worked out and the insurability of the applicant was being tested as to rate and things of that sort, the company proposed to give him interim or temporary insurance, and that is my interpretation of the contract. So my interpretation is that if Mr. Hinkle was in good health at the time that this conditional receipt was given, and if—and there is no dispute about that—if on the next day he lost his life, as it is admitted here, then under the terms of this contract it was a casualty that was insured against, and then the company would be liable for the amount of the policy.

[fol. 64] Now then, that constitutes the issue. I'm going into this in detail because the interpretation of the contract is a question of law and not a question for you to determine. The sole question for you to determine is was Mr. Hinkle in good health at the time this policy was—this contract was made with him—at the time this conditional

receipt was given to him. Now then, since that is the issue in the case, and the only issue in the case as far as the jury is concerned, then it is my duty to instruct you on the general principles of law applicable to testimony before juries. Since that is the issue, I should say to you that in cases of this type the burden of proof is upon the plaintiff to prove the averments of her complaint, and that she must do by a preponderance of the testimony. Now, by a preponderance of the testimony I do not mean necessarily the greater number of witnesses, but I do mean the testimony in that side which seems to the jury the more reasonable, the more convincing and the more satisfying to your minds. If the plaintiff, Mrs. Hinkle, has not met the burden of proof then she is not entitled to recover, or if the testimony should be even in the balance, then she is not entitled to recover.

Now, again, I would be derelict if I did not instruct you on the matter of credibility of witnesses. I told you in the beginning that you must judge the facts and not the court, so it is my duty to instruct you that you are the sole judges of the credibility of the witnesses and the weight to be accorded to the testimony of each and every witness who testified in the case. In determining the weight and credence you should accord to the testimony of any witness it is your right and your duty to take into account the conduct and demeanor of the witness on the witness stand, his interest in the case, the results of the case, if any, his bias or his prejudice against the parties, if any, his opportunity to know and understand the facts about which he gave testimony, the reasonableness or the unreasonable-
[fol. 65] ness of the testimony of such witness or any other fact or circumstance that might shed light on the truth or the falsity of said witness' testimony, and if you should believe that any witness has wilfully sworn falsely to any material fact in the case, it is then your right to disregard in whole or in part any part of the witness' testimony, or you may believe it in part and disregard it in part, as your own conscience may dictate.

Now as to the law in the case, if you should find and believe from the evidence in the case that on the 25th day

of February, 1955 the decedent, W. Max Hinkle, mentioned in the pleading, was in good health at the time that he applied for and paid for the policy of insurance in suit, then the plaintiff is entitled to recover. If you find and believe from the evidence that he was not in good health at that time, then under the plain terms of the contract—of the recital of the conditional receipt, the plaintiff is not entitled to recover. Now that is the sole issue before you and that is the question that you will decide when you go to your jury room.

Now then, I think it would be proper to review where a jury has been sitting for two days and the number of witnesses passed before it, and counsel on both sides have very properly presented matters to the court, and sometimes the jurors are confused and sometimes it is an aid to them if the judge should recall some of the witnesses and mention the testimony of some of the witnesses so that the witnesses might pass in review before the jury so that the jury can recall what the witness said, and that enables you to review the facts in the case. Mrs. Hinkle was the first witness who testified in the case. Mrs. Hinkle testified about the fact of her husband leaving early Saturday morning, early on Saturday morning of February 26, and that conditional receipt was left on the table by him. Probably an hour after her husband had left. Her whole testimony was to identify the receipt, and then she learned about 8 o'clock of the untimely death of her husband.

[fol. 66] The next witness was Berniece Hansen. She was the young lady who—Mrs. Hansen—works over there at the same place where Mr. Max Hinkle worked. Her desk was right close to his. Now, her testimony was that she was there and she overheard the conversation between Mr. Bliss and Mr. Hinkle; that, part of it.

Now, ladies and gentlemen of the jury, my viewpoint is such of this case that it is wholly unimportant whether Mrs. Hansen heard part or all, or anything of that sort, because here is a contract that says if he were in good health at

the time then there was temporary insurance that would pay his beneficiary the amount of the insurance. If he were not in good health then he is not entitled to recover regardless, because this conditional receipt only refers to an application. It makes no difference what was said in that application in my judgmet. The whole thing is whether he was in good health at that time. The application is not made a part of the conditional receipt, which I regard as contractual. It is not a part of it so it is unimportant whether Mrs. Hansen heard part or all of the conversation. Then of course counsel introduced this conditional receipt, the receipt that I have discussed before. And there is no issue. Able counsel for the defendant said, "Why, yes, sir, that receipt was issued." Mr. Bliss said, "Yes, I gave him that receipt and I wrote on it "immediate coverage."

Now then, Mr. Bliss testified that he put those words on there, and I am not giving any consideration to those words at all because I am treating this—the recital of the contract that "This insurance applied for shall be in full force and effect from this date," that would mean exactly what Mr. Bliss put on there, immediate coverage. From this date. That is the way I would interpret it.

Now then, I go down to the defendant's witnesses. Doctor Posner testified, and Doctor Posner testified that he was available. Now there was a little difference in the tes- [fol. 67] timony because probably Mr. Bliss testified that Doctor Posner was not available to examine Mr. Hinkle on that afternoon. Ladies and gentlemen of the jury, I regard that as wholly unimportant whether he was ready to examine him then or not. Neither do I think that a jury ought to say there ought to be a penalty inflicted because he didn't examine him then or that afternoon. Doctor Posner said that he was ready to examine him. Mr. Hinkle said that he was engaged that afternoon and couldn't submit to the examination. That was agreeable to everybody. It was agreed then he could go on Monday; not an unusual transaction, but I regard that as wholly unimportant be-

cause that was all based not upon the proposed protection but upon a policy that would be finally issued if they found him insurable. Now I find that the jury need not spend any time with Doctor Posner. I thought he was honest and upright and fair before the jury, and gave his recollection of what occurred; but suppose that he was ready and suppose that Mr. Hinkle said, "I am not ready to come over." Then the jury would say to me, "Does that make any difference?" I would say, "No, it doesn't make any difference because it was a cordial, mutual agreement that he was to go the next Monday and be examined." Not for the proposed insurance, but to test his insurability for the issuance of a policy. And as I said, this receipt contains the recital that the insurance shall be in force, the proposed insurance shall be in force if it appears that the proposed insured is in good health at the time of this conditional receipt, so that as I said, that submits to you ladies and gentlemen the only issue in the case.

Now then, Mr. Bliss testified. He was the agent of the company, engaged in a highly legitimate business. He had a right to go over and see Mr. Hinkle. We should not hold any prejudice or any feeling, and I am sure we do not, because he was engaged in his calling, in his business. He went over to see Mr. Hinkle about the policy and took the first part of an application. Now he said he wrote [fol. 68] down exactly what Mr. Hinkle told him. Let's assume that he did that, but the application signed by Mr. Hinkle was not a warranty of its truth. It had nothing to do with this conditional receipt. This receipt was given in connection with that and nothing more, so that when he wrote it down, whether Mr. Hinkle signed it and he wrote it later, my judgment is that Mr. Bliss was telling you the truth and that he wrote it down as Mr. Hinkle answered the questions, and there was some question as to whether or not he was entirely frank about the fact that he was operating—doing some flying. That would have all appeared later on, or probably in the final question of his insurability and the final determination as to whether the policy should be issued to him, then all these matters would have been settled and he would have either paid a

higher premium or the company would not have issued a policy at all, according to Mr. Arnold who testified in the case.

Now the next witness was Mr. Arnold, and he told you about the conditions under which policies are issued, not temporary insurance as in this case, to a proposed policyholder, but where policies were actually issued, and what the conditions were, whether they would have been issued or not, and he told you that in the event one was a flyer then no policy would be issued unless they paid a higher premium because of the hazards of doing pilot work, and of course, whether there is a hazard, we regard flying as more or less hazardous. Life in nearly all things becomes more or less hazardous, but that is not important here.

Now Mr. Robert W. Mustard testified he was the credit man engaged in—again in a legitimate and commendable business. It was his business to find out where the insurance company was about to issue an insurance policy and they were determining as to the insurability of an applicant, then they would put it in the hands of Mr. Mustard and his force, "Find out about this man." And if Mr. [fol. 69] Mustard replied that the man is in good health but he doesn't pay his debts and he wouldn't pay the premium, the insurance company would say, "We will not issue a policy to a man who won't pay his premium," or they might say that other things that would make him not insurable within the purview of the company; that was the reason that later on in the receipt it said that "provided that satisfactory evidence that the proposed insured is now insurable for the amount, plan and rating applied for is received at the home office of the company in Boston, "but if the company determines that the proposed insured is not so insurable; that is, after they have got all the data and after Mr. Mustard has made his report and they find he is not insurable and then they would say to him, "We can't issue the policy." But nevertheless here it says "the insurance applied for shall be in full force and effect —effective this date, provided the proposed insured is in

good health." That was the contract. Not on a policy of insurance, but on this receipt.

Now then, I believe I have covered all the testimony. Mr. Robert A. Evans testified in rebuttal. I do not believe that the jury need spend any time about that. Mr. Evans testified that he worked at the same place. He didn't overhear the conversations, and I do not regard that as important. That he was joint owner of the airplane flown by Mr. Hinkle; and then Mrs. Hansen was recalled to testify about what she heard at the time.

Now then on the evidence as to whether the deceased was in good health, and counsel has called my attention to the fact that there may not be any affirmative evidence—in other words, no witness said, "Well, we saw him on that day and he was in good health,"—a jury would be able to disregard that testimony if upon all the evidence in the case they would reach a conclusion that Mr. Hinkle was not in good health because you have all the facts in the case and you would consider these things. In the first place, there was offered before you a certificate of some doctor in connection with his flying operations, conditioned probably on his pilot's license, only a few months before [fol. 70] the unhappy casualty, unhappy and untimely death. In that they certified in substance that he was in good health, or otherwise a license would not have been granted to him.

Now then, you heard what was said about him, the work he was doing, the flying that he did, and what his wife said about him. And upon this testimony it is sufficient for you to reach a conclusion as to whether he was in good health or not, and that is the issue before you.

Now then, ladies and gentlemen, I believe I have covered all the law. Now I should say to you that you heard counsel tell you and tell the court—there are four counts in the complaint and they all mean about the same thing. Probably you weren't here. Mrs. Hinkle has brought the suit here as administratrix of her deceased husband's

estate and then she brought the suit in her own individual capacity, but she says in her complaint that if—she doesn't know—but that if she is entitled to recover independently of the administratrix, why then she asked that recovery be allowed her in one of the counts, so I say to you if your verdict should be for the plaintiff it would not be for Maxine K. Hinkle—Administratrix of the Estate, but for Maxine Hinkle because the undisputed testimony was—Mr. Bliss said that—and the application itself showed it, that she was named as the beneficiary, and being named as the beneficiary, then she is entitled to recover as the beneficiary under this proposed insurance.

[fol. 71] The jury thereupon returned the following

Verdict.

(Name of Court)

Maxine K. Hinkle, Plaintiff,
vs.
New England Mutual Life Insurance Company, Defendant.

We the jury in the above entitled cause find the verdict for the plaintiff and assess her damages at $10,500 with interest at 5% from February 26, 1955.

H. L. BLOESS,
Foreman.

(Said verdict was filed on January 11, 1957.)

[fol. 72] Judgment Entry.

(Filed in U. S. District Court on January 15, 1957)

In the United States District Court for the Southern District of Iowa, Central Division.

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, Plaintiffs,
No. 3-659. vs. Civil.
New England Mutual Life Insurance Company of Boston, Massachusetts, Defendant.

The court having determined from the pleadings and the statement of counsel on both sides in open court that the cause of action was in Maxine K. Hinkle as an individual and not as administratrix, and having submitted the case to the jury upon Count IV of the petition, and having withdrawn from consideration of the jury all counts except Count IV, and the jury, under instructions of the court, having returned a verdict in favor of Maxine K. Hinkle in the sum of $10,500.00, with interest at 5% from February 26, 1955, the court finds that the plaintiff, Maxine K. Hinkle, is entitled to judgment against the defendant thereon.

It Is Therefore Adjudged that the plaintiff, Maxine K. Hinkle, be and she hereby is awarded judgment against the defendant in the sum of $10,500.00, with interest thereon from the 26th day of February, 1955, and the costs of this action, and that the administratrix take nothing.

Dated at Des Moines, Iowa, this 15th day of January, 1957.

ALBERT L. REEVES,
U. S. District Judge.
(By assignment)

[fol. 73] (Motion of Defendant for Judgment notwithstanding Verdict)

(Filed in U. S. District Court, February 18, 1957)

(Title of Case)

Comes now the defendant and moves the court to set aside the verdict rendered in the above cause on the 11th day of January, 1957, together with the judgment entered thereon on the 15th day of January, 1957 and to enter judgment in its favor notwithstanding said verdict and as grounds for said motion shows to the court that at the close of all the evidence it moved the court to direct the jury to return a verdict in its favor upon the grounds stated in said motion, that the jury returned a verdict in favor of the plaintiff, and it is now entitled to judgment

in its favor despite the adverse verdict in accordance with its motion for a directed verdict and on the following grounds as set forth in its motion for a directed verdict:

(There follow in 9 numbered paragraphs the identical language of Paragraphs 1 to 9 inclusive of the Motion for Directed Verdict hereinbefore set forth and the following additional paragraph)

The defendant also moves the court for judgment in its favor notwithstanding the verdict on the ground that there was no evidence in the record to support a verdict for the plaintiff on the issue of fact submitted to the jury by the court, namely the good health of W. Max Hinkle on February 25, 1955, and that on that issue alone a verdict should have been directed for the defendant.

Duly signed by defendant's attorneys.

[fol. 74] (Memorandum Opinion of District Court on overruling of Motion of Defendant for Judgment notwithstanding Verdict)

(Filed in U. S. District Court, January 18, 1957)

(Title of Case)

Able counsel for defendant has filed a motion for judgment notwithstanding the verdict. This has been carefully examined.

It is set forth that the conditional receipt which constituted the basis of the action was but a receipt for premium and did not provide insurance for the applicant.

Adverting to the receipt, this recital is observed:

"The insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, * * *."

The subsequent provisions of the receipt were to the effect that the final consummation of the contract or application for insurance, and the issuance of a policy were or would be conditioned upon "satisfactory evidence that the

Proposed Insured (emphasis mine) is now insurable for the amount, plan and rating applied for, etc."

It is to be noted that the applicant had the benefit of insurance for the full amount applied for if it appeared that he was in good health at the time.

It was then provided that a policy would be issued only if it appeared later that the "Proposed Insured" was insurable. It is obvious that it was the purpose of the defendant to grant temporary insurance if the applicant be in good health, until it was determined later whether he was insurable.

[fol. 75] The applicant deceased before such determination should be made and the receipt, if it meant anything, meant that his beneficiary was entitled to the amount covered by the receipt.

It follows that a motion for a judgment non obstante veredicto should be and will be overruled.

Des Moines, Iowa, January 18, 1957.

ALBERT L. REEVES,
U. S. District Judge.
(By assignment)

[fol. 76] (Order of District Court overruling Motion of Defendant for Judgment notwithstanding Verdict.)

(Filed in U. S. District Court on January 18, 1957.)

(Title of Case)

The motion for judgment notwithstanding the verdict in the above cause having been taken up for consideration, and it appearing from an examination of said motion that the verdict and judgment were correct and that said motion should be overruled,

It Is Therefore Ordered And Adjudged that said motion be and the same hereby is overruled.

Des Moines, Iowa, January 18, 1957.

ALBERT L. REEVES,
U. S. District Judge.
(By Assignment)

[fol. 77] Notice Of Appeal.

(Filed in U. S. District Court February 7, 1957, with appeal bond.)

In The United States District Court
For The Southern District Of Iowa
Central Division

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine W. Hinkle, Plaintiffs,
No. 3-659. vs. Civil.
New England Mutual Life Insurance Company of Boston, Massachusetts, Defendant.

Notice is hereby given that the defendant New England Mutual Life Insurance Company of Boston, Massachusetts, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 15th day of January, 1957, and the order of court entered on the 18th day of January, 1957, overruling its motion for judgment in its favor notwithstanding the verdict of the jury.

Dated this 7th day of February, 1957.

PHINEAS M. HENRY,

RALPH A. CHURCH,

LUTHER L. HILL, JR.,
Attorneys for Defendant-Appellant,
1111Equitable Building,
Des Moines 9, Iowa.

[fol. 78] (Order of District Court extending Time to file Record on Appeal, etc.)

(Filed in U. S. District Court on February 7, 1957.)

(Title of Case)

On February 7th, 1957, the defendant herein filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. Pursuant to the oral application of the defendant's attorneys and under the provisions of Rule 73g of the Federal Rules of Civil Procedure.

It is hereby ordered that the defendant may have not more than ninety (90) days from the date of the filing of the notice of appeal in which to file the record on appeal and to docket the appeal.

Dated at Des Moines, Iowa, this 7th day of February, 1957.

ALBERT L. REEVES,
United States District Judge.

[fol. 79] (Relevant Docket Entries in United States District Court.)

(Title of Case)

1955

Nov. 8 Filed Petition for Removal from Polk County District Court.

Nov. 8 Filed Removal Bond. $1,000.00. Federal Insurance Company of New Jersey, Surety.

Nov. 9 Filed Notice of Removal with Acceptance of Service.

Nov. 14 Filed Order Enlarging time to Plea. Riley, J. (5 OJ 633)

Notice to Attys. 11/14/55.

Nov. 28 Filed Plaintiff's Demand for Jury Trial.

Dec. 5 Filed Defendant's Answer.

Dec. 10 Filed Pltffs' Reply to Deft's Answer.

1956

Mar. 3 Filed Memorandum and Order Overruling Pltffs' Motion to Remand. Harper, J. (6 OJ 84) Notice to Attys. 3-5-56.

1957

Jan. 10 Entered Jury impaneled; opening statements of counsel; evidence for plaintiffs concluded; motion of Deft. to direct jury to return verdict for Deft. overruled; evidence for Deft. concluded. Reeves, J. (6 OJ 635).

Jan. 11 Entered Procedure of trial; Deft's Motion for Directed Verdict overruled; Closing Arguments; Jury Verdict; Verdict for Maxine K. Hinkle in amount of $10,500.00 with interest at 5% from Feb. 26, 1955; written judgment to be prepared. Reeves, J. (6 OJ 639).

Jan. 11 Filed Pltffs' Exhibits 1; Deft's Exhibits A-1, A-2, B-1, C, D, E, F, G, H, I, J, K. (loose in file).

Jan. 15 Filed Judgment Entry, Reeves, J. (6 OJ 647) Notice to Attys. 1-15-57.

Jan. 15 Entered Judgment that plaintiff, Maxine K. Hinkle, have judgment against the defendant, New England Mutual Life Insurance Company of Boston, Massachusetts, in the amount of $10,500.00, with interest thereon from the 26th day of February, 1955, and the costs of this action, and that the plaintiff administratrix take nothing. Reeves, J. (6 OJ 647) Notice to Attys. 1-15-57.

[fol. 80]

Jan. 18 Filed Motion for Judgment Notwithstanding Verdict, with Certificate of Service.

Jan. 18 Field Memorandum Opinion on Motion for Judgment Notwithstanding the Verdict. Reeves, J. (Notice to Attys. 1-18-57).

Jan. 18 Filed Order Overruling Motion for Judgment Notwithstanding the Verdict. Reeves, J. (6 OJ 672) Notice to Attys. 1-18-57.

Jan. 18 Filed Pltff's Bill of Costs taxed at $40.65.

Feb. 7 Filed Deft's Notice of Appeal to Court of Appeals. Des Moines, Iowa, Feb. 7, 1957. A copy of Notice of Appeal mailed to L. S. Forrest, 25 Law Bldg., Drake University, Des Moines, Iowa, Attorney for Plaintiffs. E. E. Poston, Clerk, by /s/ Esther Lyons, Deputy Clerk.

Feb. 7 Filed Bond for Costs on Appeal. $250.00. Federal Insurance Company, Surety.

Feb. 7 Filed Order Extending Time for Filing Record on Appeal and Docketing Appeal. Reeves, J. (6 OJ 715) Notice to Attys. 2-7-57.

Feb. 7 Entered Defendant given not more than ninety (90) days from date of filing Notice of Appeal, to file record on appeal and docket the appeal. Reeves, J. (6 OJ 715).

Feb. 15 Filed Court's Copy of Transcript of Testimony.

[fol. 79]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION

Civil No. 3-659

MAXINE K. HINKLE, Administratrix of the Estate of W. MAX HINKLE, Deceased, and MAXINE K. HINKLE, Plaintiffs,

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, OF BOSTON, MASSACHUSETTS, Defendant.

MEMORANDUM AND ORDER OVERRULING PLAINTIFFS' MOTION TO REMAND—Filed March 3, 1956

Plaintiffs brought this suit in the District Court of Iowa in and for Polk County to recover from the defendant Insurance Company $10,500.00 on an alleged contract for insurance which she claims that her husband W. Max Hinkle entered into with the defendant on the 25th day of February, 1955, in Des Moines, when the latter delivered to him a receipt for $21.70 for "immediate coverage." Said receipt further provided that the insured was required to furnish defendant "satisfactory evidence" of his insurability. The parties agreed, according to the complaint, that a physical examination of Mr. Hinkle would be had before defendant's doctor on February 28, 1955. Unfortunately, Mr. Hinkle met his death on February 26, 1955, by the crashing of his own aeroplane and could not take a physical examination as was contemplated also by the receipt in question.

Defendant removed the action to this court on the ground of diversity of citizenship, stating in its petition therefor that it is a citizen of Massachusetts and that plaintiff in her individual capacity and as administratrix of her husband's estate is a citizen of Des Moines, Iowa. Plaintiffs

[fol. 80] moved to remand the action to the State Court, alleging in her motion as follows:

"1. They deny that part of paragraph 5 of the Removal Petition that states that the action is between citizens of different states, and the part that states that the Defendant is a citizen of Massachusetts."

"2. The Plaintiffs further state that the Defendant is a mutual life insurance organization and that the policyholders are the members thereof, and that the members thereof are in law Defendants in this action."

"3. * * * and that thus the citizenship of all Defendants is not diverse to that of the Plaintiffs; that some of the defendant members and policyholders are citizens of the same state as the plaintiffs."

"4. That insurance companies are now held to be engaged in commerce among the states, and Congress has undertaken to regulate them under its power to regulate such commerce, and the old law on the right to remove may be changed by acts passed under the commerce clause."

"5. That the Defendants have not met the burden that is upon them to establish jurisdiction of this claim in the Federal Courts."

Our concern now is not so much in the merits of the suit, but is centered on the question of citizenship of the parties. Plaintiff by her motion asks this court—an inferior Federal court—to abandon the doctrine established by our Supreme Court in *Louisville C. & R. Co.* v. *Letson,* 43 U.S. (2 How.) 497, that a corporation is a citizen of the state creating it. In the face of such declared and elementary law any argument contra must be addressed to an appellate court. We are bound to adhere to the long pronouncement of our highest court in this regard, and, accordingly, plaintiffs' motion to remand should be overruled.

ORDER

Upon consideration of plaintiffs' motion for remand of this action to the District Court of Iowa in and for Polk

[fol. 81] County, on the ground of lack of requisite diversity of citizenship between the parties hereto, and as stated in the court's memorandum filed herewith;

It is Ordered that plaintiffs' motion for remand be and the same is hereby overruled and denied.

Signed at Des Moines, Iowa, this 3rd day of March, 1956.

/s/ Roy W. Harper, United States District Judge, By Assignment.

[fol. 82]
United States of America,
Southern District of Iowa, ss.:

I, E. E. Poston, Clerk of the United States District Court for the Southern District of Iowa, do hereby certify that the annexed and foregoing is a true and full copy of the original Memorandum and Order Overruling Plaintiffs' Motion to Remand in No. 3-659 Civil Action, Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, Plaintiffs, vs. New England Mutual Life Insurance Company, of Boston, Massachusetts, Defendant, filed March 3, 1956, Central Division, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Des Moines, Iowa, this 26th day of December, A. D. 1957.

E. E. Poston, Clerk, by Fred O. Morrow, Deputy Clerk.

(SEAL)

[fol. 83]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,740

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, Appellant,

v.

MAXINE K. HINKLE, Administratrix of the Estate of W. MAX HINKLE, Deceased, and MAXINE K. HINKLE, Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

Phineas M. Henry (Ralph A. Church and Luther L. Hill, Jr., were with him on the brief) for Appellant.

Leland S. Forrest for Appellees.

Before Sanborn, Woodrough, and Van Oosterhout, Circuit Judges.

OPINION—November 5, 1957

VAN OOSTERHOUT, Circuit Judge.

Defendant insurance company has appealed from a judgment entered against it upon an alleged contract of [fol. 84] temporary life insurance. Jurisdiction based upon diversity of citizenship is established.

Rodney Bliss, Jr., general agent of the defendant, learned that W. Max Hinkle had made a mortgage upon his home. Hinkle was service and parts manager for the Onthank Company. Bliss, on February 25, 1955, called upon Hinkle at Hinkle's place of employment to sell him insurance. Defendant's decreasing term policy was fully explained to Hinkle. The policy discussed afforded initial insurance

coverage of $10,500 with coverage declining at the rate of $500 per year. Hinkle signed a written application for such a policy at standard rates and paid by check the initial quarterly premium. Thereupon, he was given a conditional receipt reading as follows:

"CONDITIONAL RECEIPT. DO NOT DESTROY.

Received Twenty-one and 70/100 Dollars in connection with an Application made this day to the New England Mutual Life Insurance Company, of Boston, Massachusetts, for Insurance of $10,500 on the life of W. Max Hinkle.

Immediate Coverage

"The insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft given in payment of this premium is not paid on presentation, this receipt [fol. 85] shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Philip C. Raye, *Secretary.*

Countersigned 2-25, 1955.

Rodney Bliss, Jr., General Agent.

If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt, the premium will be refunded."

The above receipt is upon a regularly printed form of defendant. The name of the proposed insured, the amount

of insurance, the premium, and the date were filled in by Bliss. Bliss also wrote in the words "Immediate Coverage" appearing in the receipt. He signed the receipt as general agent and delivered it to Hinkle.

It was understood between Bliss and Hinkle that Hinkle was to submit to a medical examination by the company's medical examiner. An appointment for such medical examination was made for February 28, 1955. There is a conflict in evidence whether the medical examination was deferred to February 28 to suit Hinkle's convenience or that of the company's doctor. Hinkle was killed on February 26, 1955, when the plane which he was operating crashed near Des Moines.

Plaintiff, Maxine K. Hinkle, widow of insured, brought this action individually, as beneficiary, and as administratrix of Hinkle's estate, alleging that defendant had assumed insurance coverage upon Hinkle because of the words "immediate coverage" written in the receipt by the agent, Bliss; and that, if such is not the situation, there is a conditional liability on the part of the insurer, and that all the conditions had been performed or excused or pre- [fol. 86] vented from occurring by the defendant. The court submitted to the jury only the claim asserted by the plaintiff individually as beneficiary. Mrs. Hinkle was designated as beneficiary in the application and was entitled to recover if at all as beneficiary.

Defendant at the close of the evidence made a motion for directed verdict which was overruled. The motion is set out in a footnote.[1] The jury found for the plaintiff

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[1] Motion for Directed Verdict.

Now then at the close of the evidence the defendant moves the court to direct the jury to return a verdict for the defendant on Count IV of the petition on the following grounds:

1. The conditional receipt offered in evidence, and alleged to be a contract of insurance is not a contract, but a receipt delivered to evidence the payment of a first premium in connection with an application for life insurance, and the terms upon which the first premium was paid. It was merely a part of a transaction which constituted an application for life insurance. Said application was not completed and was not accepted by the defendant, and there was no meeting of the minds of the parties to form a contract.

2. The said conditional receipt was conditioned upon the receipt of satisfactory evidence at the home office in Boston that the

[fol. 87] and judgment for plaintiff was entered. Defendant filed a timely motion for judgment n.o.v., restating the grounds urged in his motion for directed verdict and adding a new ground as follows:

> "The defendant also moves the court for judgment in its favor notwithstanding the verdict on the ground that there was no evidence in the record to support a verdict for the plaintiff on the issue of fact submitted to the jury by the court, namely the good health of W. Max Hinkle on February 25, 1955, and that on that issue alone a verdict should have been directed for the defendant."

This appeal is based upon defendant's contention that the court erred in overruling its motions for directed verdict [fol. 88] and for judgment n.o.v. Defendant contends that it is entitled to judgment for the reasons stated in the motions.

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proposed insured was insurable for the amount, plan and rating applied for. It appears from the record that no such evidence was sent to the home office of the defendant at Boston or received by it there, and in fact, no such evidence could have been furnished by the proposed insured in view of his aviation record.

3. The conditional receipt contemplated and expressly provided in the third clause of the printed matter therein "If the company determines that the proposed insured is not so insurable, said application shall be declined and the amount paid will be refunded upon return of this receipt." This provision requires and contemplates a determination by the company as to the insurability of the proposed insured for the amount, plan and rating applied for, and, provided that, if the company determines that the proposed insured is not so insurable, the application will be declined; that this provision negatives the construction of the receipt as being in itself a contract for temporary insurance.

4. The insertion of the words "immediate coverage" below the amount of insurance applied for in the conditional receipt does not convert the receipt into a contract of temporary insurance in view of the fact that a decreasing term policy was applied for, and the proposed insured was advised that the amount of insurance in the first year was $10,500, and would decrease annually thereafter.

5. If said receipt is construed to be a contract of insurance because of the addition of the words "immediate coverage" under

It appears to us that the vital question involved in this appeal is the construction to be given to the conditional receipt heretofore set out. The execution and delivery of the application, the payment of the premium, and the issuance of the receipt all occurred in Iowa. We agree with the parties that Iowa law controls.

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the amount of insurance applied for, said contract is not binding on the defendant because the agent, Bliss, had no authority to make, alter or discharge any policies, contracts or agreements on behalf of or in the name of the company, or, to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the company, to incur any obligations or liability for which the company should be responsible.

6. If said receipt is construed to be a contract of insurance, it is not a valid contract under the laws of Iowa because the defendant was prohibited by the statutes of Iowa from issuing contracts of insurance in an amount more than $10,000 without a medical examination duly passed and approved by the medical examiner or the medical board of the company. Section 508.28 of the Code of Iowa, 1954, requires or contains this language: "The Commissioner of Insurance shall decline to approve any form of policy unless insurance is based upon the satisfactory medical examination of applicant by a physician, and no policy or contract shall be issued by any insurance company to any individual until such examination has been passed and duly approved by the medical examiner or the medical board of the company." And then in a subsequent section there is a provision that non-medical insurance may be issued up to $10,000.

7. It appears from the record that there was no medical examination because of failure of the proposed insured to have an examination. Therefore, he failed to furnish an application upon which the defendant, under the law of Iowa, could insure his life for $10,500.

8. It appears from the evidence that the proposed insured was informed that a medical examination was necessary in connection with his application for life insurance. His failure to take said medical examination, as shown by the record, was not due to any act or neglect on the part of defendant, and there is no evidence that said medical examination was waived by the defendant.

9. It appears from the evidence that because of the proposed insured's aviation record, he was not insurable for the plan and rating applied for under the defendant's underwriting rules and practices. Regardless of whether the answer to Question 17 (a) in the application was written by the agent before or after the proposed insured signed the application, if he had answered "yes" to said question he was not insurable for the plan and rating applied for.

One of the leading cases in the field of temporary life insurance is *Reynolds* v. *Northwestern Mutual Life Ins. Co.*, 189 Iowa 76, 176 N.W. 207. In that case the Iowa court had occasion to consider a conditional receipt very similar to the one now before us. There, as in our present case, the first premium had been paid. In the *Reynolds* case the condition was, "provided the said company in its judgment shall be satisfied as to my insurability, on the plan applied for, on the date of such medical examination." Here, the material condition is, "provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston." The Iowa court in *Reynolds* recognized that preliminary contracts of insurance are valid and enforceable. The court then states that the contract must be construed as a whole, and effect must be given to the condition relating to insurability. The court says (p. 209):

> "* * * The insurability of the applicant on the date of the medical examination is, by the contract made the test of the company's liability."

The court construes the contract as a whole as follows (p. 209):

> "* * * Unless the application is in the proper exercise of the company's rights, under the law and the [fol. 89] contract, rejected, and the insurance refused, the preliminary contract provides protection from the date of the medical examination, and if death results from some cause arising after the date of such examination, the company is liable upon the contract, according to its terms: but if the company, in the proper exercise of its legal rights, under the law and the contract, which it is unnecessary for us to define in this opinion, rejects the application upon the ground that the applicant is not insurable and returns the premium paid, no liability can arise thereunder."

In the *Reynolds* case the applicant died before the completion of the investigation as to his health. The insurer,

after applicant's death, rejected the application upon the ground that the applicant was not an insurable risk on the date of the medical examination. The Supreme Court of Iowa determined that the trial court had properly found as a matter of law that the insurer had in good faith rejected the application on the ground that the applicant was not insurable for the policy applied for, stating (p. 210):

> "* * * The record, we think leaves no doubt that he was not entitled to insurance and that no liability existed upon the contract. The fact that the company did not, prior to his death, know that deceased had been for several months afflicted with heart trouble, should not be given controlling importance. It goes to the question of his insurability. * * *"

That the subject of temporary life insurance pending approval of application or issuance of policy has caused the courts considerable difficulty is demonstrated by an exhaustive note in 2 A.L.R. 2d 943. The wording of the binders or conditional receipts involved in the decided cases varies considerably. The author of the cited annotation, at p. 960, classifies the types of contracts of temporary insurance in general use as follows:

> [fol. 90] "(1) The first type of contract, around which most of the existing conflict centers, usually provides that any insurance shall, by reason of the payment of a premium at the time of the application, be in force from the date of the application (or of the medical examination), provided the application shall be approved and accepted, as applied for, at the home office of the insurance company.
>
> "(2) Another type of receipt provides that the insurance shall be effective as of the date of the medical examination, if the company shall be satisfied that on that date the applicant was an insurable risk and that the application was otherwise acceptable under the company's regulations for the amount and plan of the policy applied for. In some instances the date of the

application is taken instead of the date of the medical examination.

"(3) In a third type of receipt the provision is that the insurance shall be in force as of the date of the application or the medical examination if the company at its home office shall issue the policy on the plan applied for. In some instances delivery of the policy is required.

"(4) The fourth type of receipt is represented by the unconditional provision that the insurance shall take effect as of the date of the approval of the application by the insurer."

The conditional receipt we are considering would appear to be of the class described in paragraph 2. The variance is that in our present case the effective date of the insurance is made the date of the receipt rather than the date of the medical examination. The annotator, at page 987, cites authorities upholding the validity of a condition of insurability, among them, *Reynolds* v. *Northwestern Mutual Life Ins. Co.*, supra; *Warren* v. *New York Life Ins. Co.*, 5 Cir., 128 F.2d 671; *Gonsoulin* v. *Equitable Life* [fol. 91] *Assurance Society*, 152 La. 865, 94 So. 424; *Equitable Life Assurance Society* v. *Robertson*, Mo. App., 191 S.W. 989.

The application and conditional receipt in *Mofrad* v. *New York Life Ins. Co.*, 10 Cir., 206 F.2d 491, are of the same general type we are here considering. In that case a directed verdict for the insurer was affirmed upon the basis that the insurance was not in force because the applicant had not met the insurability test. The court upon the issue of construction states (pp. 493, 494):

"* * * 'A contract of insurance rests upon and is controlled by the same principles of law applicable to any other contract. What the contracting parties intended, mutually agreed to, and their minds met upon, is the measure of their obligations.' * * * And if the intentions of the parties are clear from an examination of the contractual documents, this court will not rewrite the contract. * * *"

> "The application for the policy provided that the insurance policy should be dated as of the date of the application. 'It was within the rights of, and was competent for, the parties to provide in the application under what conditions and at what time the policy should become effective and binding.' *Jones* v. *New York Life Ins. Co.*, 1927, 69 Utah 172, 293 P. 200, 202. The provisions in the application agreement do not fix the effective date of the insurance contract. They simply impose conditions precedent to the taking effect of the insurance coverage. *Shira* v. *New York Life Ins. Co.*, 10 Cir., 1937, 90 F.2d 953. When read together, they mean that the insurance coverage shall take effect only in the event the conditions precedent specified in the application are fulfilled, and then only as of the date of the application. * * * "

As pointed out by Judge Clark in his concurring opinion in *Gaunt* v. *John Hancock Mutual Life Ins. Co.*, 2 Cir., 160 F.2d 599, 603, the insurability condition is much fairer to the insured than the approval condition. Under the [fol. 92] approval condition absolute power remains in the insurer to reject the risk. Under the insurability condition the risk can be rejected only in the event a good faith determination is made of lack of insurability as of the time the temporary insurance was to become effective.

The effect of the words "Immediate Coverage" written into the receipt by the agent must be considered. Under the *Reynolds* case, supra, a receipt such as the one we are considering provides immediate coverage, subject to the provisos setting out the circumstances under which the insurance would not be in effect. Unless the words "Immediate Coverage" were intended to eliminate the conditions agreed upon, the addition of the words does not change the meaning of the contract. We observe that the receipt is labeled "CONDITIONAL RECEIPT" in large letters. The conditions are plainly stated in the receipt. The conditions were not eliminated from the receipt, nor were they expressly waived. The conditions remained a part of the receipt as delivered. We do not believe that it can fairly be said that the addition of the words "Immediate Cov-

erage" was intended to eliminate the conditions. Under such a construction of the contract as a whole, we do not reach the serious question of the authority of the agent, Bliss, to alter the receipt or to agree to immediate unconditional coverage.

From our consideration of the authorities heretofore cited, we believe that the Iowa court would not find the conditional receipt before us ambiguous, and would construe it as providing insurance from the date of the receipt, subject to the condition that if the insurer rejects the application in good faith for valid reasons upon the ground that the applicant is not insurable for the amount, rating, and plan applied for, and the premium is returned, no [fol. 93] liability will exist even if death occurs before notice of rejection. The check given for the premium was never cashed. It was returned to the beneficiary and later sent to the defendant by plaintiff's attorney. The insurer has tendered its return.

Defendant contended in its motions in the trial and contends here that there could be no valid temporary insurance, relying upon language in the *Reynolds* case, supra, relating to insurability upon the date of the medical examination. In the *Reynolds* and some of the other cases relied upon by defendant the conditional receipt called for insurability on the date of the medical examination. In our present case the receipt provides that the insurance applied for shall be in effect from this date (obviously meaning the date of the receipt), subject of course to the provisos. There is nothing in Part I of the application inconsistent with the receipt. The application provides that if the premium is paid with the application "the insurance shall take effect as stipulated in the Conditional Receipt." The conditional receipt on the basis of the words it contains can not fairly be construed to add the medical examination as an additional condition precedent. Whether by implication of law such a condition is to be read into such receipt because of section 508.28 of the Code of Iowa, 1954, prohibiting the issuance of a policy of life insurance for more than $10,000 until a satisfactory medical examination shall have been passed and approved by the medical examiner or medical board of a life insurance company, raises an

unsettled question of Iowa law upon which we deem it unnecessary and, hence, inadvisable to express an opinion.

It was contemplated by the parties that the proposed insured submit to medical examination. By mutual agree-[fol. 94] ment such examination was deferred until February 28, 1955. At the time of the application no one anticipated the proposed insured's untimely death. The fact dispute as to who requested the postponement of the medical examination has no bearing upon the result we reach.

The conditional receipt we are considering contains two provisos, the first pertaining to good health and the second to insurability. The trial court submitted the issue of the good health of the applicant at the time of the application to the jury, and in effect told the jury that if they found for the plaintiff on this issue, the verdict should be for her. The jury found for the plaintiff.

There is serious doubt whether the question of the sufficiency of the evidence to sustain the jury's verdict upon the good health issue is properly before us for review. Since we consider our determination upon the insurability issue, hereinafter discussed, decisive of this case, we shall assume without deciding that there was enough evidence to make the issue of good health, standing alone, one of fact for the jury, and that the jury's finding that the applicant was in good health is binding upon us.

This leaves for consideration the condition as to insurability. The trial court took the position that good health and insurability are practically synonymous. In so doing the trial court erred. While there are some authorities to support such position, the weight of authority and the better rule are contrary. Good health is an element of insurability, but is only one of many elements to consider upon the issue of insurability. The authorities on the meaning of insurability are ably discussed in *Kirby* v. *Prudential Insurance Company of America*, Mo. App., 191 S.W.2d 379, 162 A.L.R. 660. The court concludes:

> [fol. 95] "We cannot say that the term insurability is ambiguous and is susceptible of two different interpretations, one of which is 'good health.' It is not

thought that the man on the street would so construe the term. Probably most people know that to be insurable one must have good health; but they also know that good health is not the only factor about which insurance companies are concerned in the issuance of policies. They know that insurability means more than good health."

In *Rosenbloom* v. *New York Life Ins. Co.*, W. D. Mo., 65 F.Supp. 692, Judge Ridge quotes with approval from the *Kirby* case and states (p. 696):

"* * * From the opinion in the *Kirby* case, supra, and the authorities cited therein, it is manifest that the term 'insurability' is a term of art when used in conjunction with life insurance. 'Insurability' as a term of art signifies all those physical and moral factors reasonably taken into consideration by life insurance companies in determining coverage or matters affecting the risk."

In reversing the *Rosenbloom* case on other grounds this court said (163 F.2d 1, at p. 4):

"* * * For the purposes of this opinion, we assume that 'insurability' may include elements other than health—such as vocation. * * *"

In *Kallman* v. *Equitable Life Assurance Society*, 248 App. Div. 146, 288 NYS 1032, the court speaks as follows:

"* * * The distinction between 'good health' and 'insurability' might be illustrated in the case of a criminal condemned to death. On the eve of his execution he might be found to be in perfect physical condition, but it could not be reasonably contended that his situation did not affect his insurability. There are numerous circumstances which affect insurability. * * *"

[fol. 96] In *Warren* v. *New York Life Ins. Co.*, supra, the premium had been paid, and the insurability proviso was similar to that in the present case. Applicant had made negative answers to aviation questions. From investiga-

tion the insurer learned of applicant's flying, suspended the application, and requested applicant to fill out an aviation form. The applicant died in an automobile accident before this was done. Recovery was denied upon the basis that no insurance was in force. The insurability proviso is not discussed. However, in the District Court opinion, 37 F.Supp. 358, 362, in considering the materiality of false representations as to insurance, the court states, "The risk caused by participation in aeronautics is a serious one." In *Kirby* v. *Prudential Insurance Company of America*, supra, the court approved the finding of the trial judge against an applicant for reinstatement on the basis that the applicant was engaged in aeronautics and that such activities substantially increased the risk, stating that the trial court could not properly have found otherwise.

We find the reasoning of the cases holding "insurability" is broader than "good health" to be sound and convincing. For the purposes of our present case it is not necessary to determine just how broad the scope of the term "insurability" is. We are satisfied that an insurer is justified in taking into consideration a hazardous activity, such as flying, in determining insurability.

The undisputed evidence shows that the proposed insured had held a pilot's license since 1946, and that he had owned an interest in a plane continuously since 1951. He flew every Sunday when the weather permitted, and his 1954 license showed he reported 1450 hours of flying time. The evidence likewise establishes that the insurer [fol. 97] uniformly declined to accept at standard rates risks of applicants engaged in flying. The company's policy in the case of applicants engaged in aviation was to require the applicant to fill out an aviation questionnaire which, among other things, asked the applicant whether, in the event the policy could not be delivered at standard rates, he desired a policy at standard rates with an aviation exclusion, or full coverage at extra premium. The extra premium for aviation coverage was $3.75 per thousand per year, which would have increased the premium on the policy applied for nearly 50 per cent.

The questions on the application pertaining to aviation were answered by applicant in the negative. The application contains a certification that the information appearing

on the application is correctly recorded. Hinkle signed the application. Bliss testified that aviation questions were asked and the answers properly recorded. We have serious doubt whether there is any substantial evidence to the contrary. Mrs. Hansen, a fellow employee of applicant, who had testified in the case in chief, was recalled in rebuttal, and testified that she was within a few feet of applicant's desk at the time the application was filled out. She said she didn't pay much attention to the conversation, but that she knew Mr. Hinkle flew frequently and to the best of her recollection she did not hear any mention of aviation.

In the briefs of the respective parties, each is seeking to blame the other for the false answers to the aviation questions, and to assert rights based upon such contentions. The trial court in its instructions to the jury said:

> "Now, ladies and gentlemen of the jury, my viewpoint is such of this case that it is wholly unimportant whether Mrs. Hansen heard part or all, or anything of [fol. 98] that sort, because here is a contract that says if he were in good health at the time then there was temporary insurance that would pay his beneficiary the amount of the insurance. If he were not in good health then he is not entitled to recover regardless, because this conditional receipt only refers to an application. It makes no difference what was said in that application in my judgment. * * * "

Neither side excepted to the instructions given, or requested instructions on the theories they are now advancing. We do not believe that the question of who was responsible for the false answers as to aviation on the application is of any importance on this appeal. The defendant was not limited to information contained in the application in passing upon the question of insurability. The defendant had before it the information as to aviation before it acted on the application.

It is apparent that the application for insurance was for insurance at standard rates. The premium was paid upon the basis of standard rates. No information was disclosed by the applicant to the effect that he was engaged

in flying. The evidence conclusively shows that the proposed insured, because of his aviation activities, was not insurable for the amount, plan and rating applied for, and that the defendant made a good faith determination that he was not so insurable. The fact that Hinkle might have been able to obtain insurance at a higher rate is of no help to the plaintiff as such was not the coverage applied for.

Defendant in its pleadings asserts that if temporary insurance existed it was conditional, and that the insurance never became effective because the condition as to insurability was not met. This issue is also raised in the motions for a directed verdict and for judgment n.o.v. Plaintiff complains that the defendant did not fully investigate [fol. 98a] applicant's insurability. Sufficient information of applicant's aviation activities, evidence as to which was introduced at the trial, came to the defendant to warrant it in good faith to determine that the applicant was not an insurable risk for the plan applied for. The applicant died in an airplane crash the day following the application and before the application could have reached the home office. There was no time for investigation prior to the applicant's death. Any delay in the investigation under such circumstances was in no way prejudicial to plaintiff.

The defendant was legally entitled to have its motion for directed verdict sustained upon the basis that the insurance was not in effect at the time of the applicant's death, for the reason that the applicant did not, and could not, meet the insurability condition set out in the conditional receipt because of his aviation pursuits.

Other issues argued by the parties have been considered, but do not warrant discussion for the reason that what has heretofore been said compels a reversal.

The judgment appealed from is reversed, and this case is remanded with directions to enter judgment for defendant.

Woodrough, Circuit Judge (Dissenting).

The controversy here grows out of a well known kind of transaction between the insurance company and a so-called "proposed insured" that is soundly helpful to the

business of selling life insurance, but has been unhappily considered in such a way as to bring discredit on the com-
[fol. 99] panies and grief and suffering on certain unfortunate widows and orphaned children.

In the life insurance business it takes a little time for the companies to check on insurability of prospects and sometimes to adjust clerical or other incidental details and that little delay hampers the selling of life insurance on which the existence of the companies is dependent. To meet that condition, the insurance agents are supplied with the printed form such as was used in this case, headed in bold type "Conditional Receipt", the terms of which enable the agents to assure a prospective purchaser of life insurance that he will not be affected by that unavoidable little delay, but that if he is in good health, he will have (in this case) $10,500.00 insurance on his life in full force and effect from the day he delivers the amount of the first premium to the agent. The conditional receipt bears conspicuously the name of the company (in this case, New England Mutual Life Insurance Company) and the signature and counter signature of company officers; to-wit: General Agent and Secretary, and distinguishing between the time after the necessary delay when a proper policy is conditionally to be issued, and the time of the transaction, the General Agent inserts the date of the transaction conspicuously in writing in the blank for that purpose so that the instrument reads, "Insurance applied for shall be in full force and effect from this date provided the proposed insured is now in good health"—(in this case the date of payment, February 25, 1955, was written in with a pen,) "2/25/1955" and the printing included "this day" (twice repeated) "this date" and "now"; all being used in the instrument to stress that the transaction relates to the undertaking of a present obligation by the company and not to the policy of life insurance that is to be issued later, only on certain conditions.

[fol. 100] Laymen who are solicited in this transaction understand perfectly that when they pay the money and get the receipt, they have the company's obligation to pay if they die before the final closing of their insurance deal. In this case when the "proposed insured" left his home to

go to his death the next day, after he made his payment to the agent, he left the "Conditional Receipt" the company gave him where his wife would find it and know he thought of her and believed he had provided for her.

The transaction with the company's agent that caused that belief was an entirely fair one and involved no discrimination in favor of the receipt holder and no unfair burden on the company.

In the first place if the proposed insured lied when he said he was in good health, there was no liability on the company. The first and only condition precedent to the obligation the company declared in its receipt, namely, that the insurance was immediately affective, (sic) was as above stated, that the "proposed insured is now in good health."

The other condition in the receipt was a condition subsequent to the company's obligation declared in the receipt to the effect that if, after its date, satisfactory evidence of the proposed insured's insurability was not received at the company's home office in Boston or if the company determined he was not insurable, it would decline his application for a policy.

This condition of the receipt is not incompatible or in conflict with the company's obligation for "insurance in full force from this date." The two accord fully with each other. The words of the receipt make it perfectly plain that the company would not ultimately issue an insurance policy unless the company became satisfied of [fol. 101] insurability. But that had nothing to do with the willingness of the company to make and fulfill the obligation concerning "insurance in effect from this date" declared in the receipt.

When Mr. Hinkle died, the day after the receipt had been delivered to him and his money had been accepted, all of the conditions upon the company's obligation to pay the amount of $10,500.00 specified in the receipt had become satisfied and the company should pay. The situation then was simply that the company had agreed that if Mr. Hinkle died the money would be paid and if he survived, the matter would go forward to the issuance of a policy or denial of it. After his death there was no point or sense in going on with any inquiry about his eligibility for a life

insurance policy of any particular kind or about any other detail that might have come up if he had not died and if the transaction had been proceeded with.

There is no element of harshness or unfairness to the company or discrimination towards its patrons in the transaction with the receipt. The terms of the receipt protect the company and forestall such a consequence. The receipt specifies that on determining non-liability, the company will refund the payment made to it by the proposed insured, but it does not state in express words what is to be done with the money paid on the happening of death while the "insurance is in full force from this date" before such company determination. Neither does it state what is to be done with the money if the policy issues. Manifestly the death obviated making the determination as to insurability so that the payment in the hands of the company has to be applied in accord with the necessary implication of the transaction in which it was paid and received.

[fol. 102] The recital of the receipt is that the payment was "in connection with the application for insurance of $10,500.00 on the life of W. Max Hinkle" so that the company's right to apply it on the temporary coverage is complete and exactly as clear as its right to apply it on the first premium of a policy would have been if such policy had issued. So far as applying the payment is concerned, the same words cover both situations.

The payment manifestly was amply sufficient to fully compensate the company for the risk it took under its obligation for insurance in full force and effect from "this date". That is practically demonstrated by the fact that insurance for short term is daily and hourly sold throughout the country through vending machines that deliver a policy for $10,000.00 to anybody and everybody who deposits a fifty-cent coin in the slot. The record shows that the insurance herein was to cost $20.70 a quarter or $82.80 per year of 365 days or 22¢ a day.

In the transaction herein involved it is true the company stood to absolutely lose that 22¢ a day if Mr. Hinkle lived and his application was declined. In that event it was obligated to refund the entire $20.70. But the part of that refund the company would lose if the company had to

make it probably would not equal the cost of the time of the agent soliciting or of an advertising calendar or gadget also risked to obtain a new policy holder who might well be expected to bring in hundreds or even thousands of dollars of premiums.

It might be only "petty stuff" to give a short year's insurance for a full years premium, but it is such a serious wrong for a company to make a man believe it has insured him and to take his money therefore, (sic) if it does not so [fol. 103] intend and I see no reason to ascribe such a thing to the company in this case.

I am not convinced that the few Iowa cases cited prohibit sustaining the judgment for the widow in this case. I would affirm the judgment.

[fol. 104]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15740—September Term, 1957.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, Appellant,

v.

MAXINE K. HINKLE, Administratrix of the Estate of W. MAX HINKLE, Deceased, and MAXINE K. HINKLE.

Appeal from the United States District Court for the Southern District of Iowa.

JUDGMENT—November 5, 1957

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said

District Court, in this cause, be, and the same is hereby, reversed with costs; and that New England Mutual Life Insurance Company of Boston, Massachusetts, have and recover against Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, the sum of Three Hundred Eighty-one and 15/100 ($381.15) Dollars for its costs in this behalf expended and have execution therefor.

And it is further Ordered by this Court that this cause, be, and the same is hereby, remanded to the said District Court with directions to enter judgment for defendant.

November 5th, 1957.

[fol. 105] Petition for rehearing covering 19 pages filed November 22, 1957 omitted from this print.

It was denied, and nothing more by order December 6, 1957.

[fol. 129]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION OF APPELLEES FOR REHEARING, ETC.—December 6, 1957

On Consideration of the petition of the appellees for a rehearing and the request for consideration by this Court en banc in this cause, It is now here Ordered that the same be, and they are each hereby, denied.

[fol. 131]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—December 18, 1957

On Consideration of the motion of the appellees for a stay of the mandate in this cause pending a petition to

the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 133] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 135]

SUPREME COURT OF THE UNITED STATES

No. 714—October Term, 1957

MAXINE K. HINKLE, Administratrix of the Estate of W. MAX HINKLE, Deceased, and MAXINE K. HINKLE, Petitioners,

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS.

ORDER ALLOWING CERTIORARI—March 10, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1958

No. [redacted] 28

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Des Moines, Iowa,
Attorney for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1958.

No. .....

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

I.

Your petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this cause, Civil No. 15,740 in said Court.

OPINION BELOW.

The majority and dissenting opinions, both upon the original hearing and upon the petition for rehearing are reported in 248 F.2d 879, and are herein printed in the Appendix to this Petition, pp. A2 to A23. The judgment of the trial court which was reversed appears in the Record.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under 28 United States Code, Sections 1254 (1) and 2101 (c), providing for review by this Court by certiorari of decisions of a Court of Appeals.

The date of the opinion sought to be reviewed was November 5, 1957. A petition for rehearing was filed in apt time, and was denied on December 6, 1957, and the judgment reversing the District Court became final on that date.

QUESTIONS PRESENTED.

I.

Violation of the Erie Rule by the Court of Appeals.

The Court of Appeals reversed a judgment upon a verdict for a plaintiff wherein the trial court followed the Iowa decisions by the court of last resort both as to *how*, *when* and *by whom* an insurance company can extricate itself from a printed contract of preliminary insurance made in the state of Iowa, including the Iowa doctrine of "mending his hold".

While the prevailing opinion on appeal purports to be finding what the Iowa law is, it does not follow latest Iowa decisions, as the trial court did, but cites and quotes at length from *Mofrad* v. *New York Life,* (10th Circuit) 206 F.2d 491, a Utah contract, and the opinion seems to hold that because that is the Utah law it should be the Iowa law. The opinion is influenced by the quotation and citation from non-Iowa cases set out on pages A10 to A17 thereof, and shows on its face that the majority does not abide by the rule in *Erie Railway* v. *Tompkins,* 304 U.S. 64.

The trial court required a strict compliance with the exact words of the contract as drafted by the insurance company with regard to the "defeasance" clause in accord with the decisions of the Supreme Court of Iowa, which Iowa law is as follows:

> "Although an insurance company, even after it learns of the death of insured, may exercise its power under the defeasance clause somewhat similar to that printed herein, when it had previously begun to process the application in its regular channels before knowledge of death, if it completed its customary investigation and determined in the usual course of passing on applications not to issue a permanent policy based upon a good faith finding by those in authority at the home office that he was not insurable because of bad health."
>
> *Reynolds* v. *Northwestern Mutual Life,* 189 Iowa 76, 176 N.W. 207.

> "But this power to avoid a contract under the express defeasance clause is terminated by the company giving some other excuse for not performing ('Mending his hold') and power can only be exercised by those authorized by their by-laws, and in the due course of company procedure."
>
> *Farmers Milling Co.* v. *Ins. Co.,* 127 Iowa 315, 103 N.W. 207.

The trial court held that there was no pleading and no evidence of any attempt of defendant to exercise its power under the defeasance clause, and thus to avoid the contract, within the time and in the manner required by the Iowa decisions.

The Court of Appeals disregarded these decisions of the Supreme Court of Iowa and the holding of the Trial court and Iowa Code, § 511.34, and held on page A18 of their opinion that defendant had "made a determination" that Hinkle was not insurable, disregarding the time and manner required. Also defendant never claimed either in its evidence, its pleading, or errors argued, that it ever attempted to make such a determination, and the only evidence was that defendant's General Agent for Iowa tried to "bluff out" the widow into believing that there was no contract of insurance. Their vice president testified they had no record that they had ever received the application (Record p. 47). It also disregarded the spirit of Iowa decisions that defeasance clauses must be strictly followed to avoid forfeitures, if possible, as in *Temple* v. *Fraternal Bankers Reserve Ins.*, 179 Iowa 65, 161 N.W. 102. The clause was not strictly followed, or even put in issue at all and defendant did not claim that they had made a determination in their usual course of prcedure and determined not to issue a permanent policy, merely that the application contained false statements. (We point out later that there was no misrepresentations, that the agent kept the only copy of the application signed before the blank spaces were filled in, and filled in false answers after he learned of the death.)

Thus, even if the facts were as found by the opinion, they still violate the Erie rule, and it reversed the Trial court because he did not violate such rule.

B. The Court on its own motion passed on a point of Iowa law not assigned as an error, and did not follow any Iowa decisions therein, as follows:

At the time of delivering the printed contract the insurance agent wrote therein in ink the words "immediate coverage". The evidence of defendant also showed that there was printed upon the application, words to the effect that the premium was charged from the date of the application, not the date of the policy, and the vice president testified that if they had issued a policy to Hinkle the due date of the annual premiums would have been the date of the application, not the date of the policy (Record p. 49). The only error assigned or argued with regard to this writing, was that the agent had no authority to write it there, and that the entire receipt was merely an offer, and did not become a contract until accepted by issuing a policy. The written briefs of both parties concerning this writing were confined to the Iowa decisions as to the agent's authority under such circumstances. It was conceded by both parties that if this "receipt" was a contract at all, the question on appeal was whether under the Iowa decisions the agent had authority. The appellate court refused to use the Iowa cases cited by the parties because it held the words "immediate coverage" did not supersede the conditions that were printed, and thus it was unnecessary to pass upon the authority of the agent. If the court had read the Iowa cases cited in appellee's brief, it would have found that the Iowa Supreme Court considered that under the circumstances of charging a premium during the interval, such a promise does supersede the printed conditions, otherwise the Iowa court would not have taken the trouble to hold that the agent did have "apparent authority" in spite of an express restriction in his agency contract to the contrary—that on that point Iowa follows an estoppel doctrine.

The Iowa cases cited and ignored by the opinion are *Nertney* v. *National Fire Ins. Co.*, 199 Iowa 1358, 203 N.W. 826; *Boever* v. *Great American Ins. Co.*, 221 Iowa 566, 266 N.W. 276; *McDonald* v. *Equitable Life Ass. Soc.*, 185 Iowa 1008, 169 N.W. 352, and they show that the Iowa law is opposite to that held by the majority opinion. Could be that Iowa law implies one has insurance if he is charged for it.

The recital of what the Iowa law is without citing any authority, and a refusal to pass upon the Iowa decisions, violates the Erie rule, and also is not procedural due process.

C. To reverse an Iowa trial judge based on "weight of authority" violates the Erie rule.

On page A16 the opinion says the trial court erred because he took the position in a colloquy that good health and insurability are synonymous, and thus erred, and then the opinion discusses the split of authority on that point and decides it according to the "weight of authority", without any Iowa cases. We think the Court misunderstood the Record, and that the trial court held just the opposite of what the opinion understands, but if the trial court did so hold, the opinion violates the Erie rule, for there are no Iowa cases on that point at all, none were cited and none can be found. In a diversity case the Federal trial court is an Iowa forum, and if he held what they say he held, they violate the Erie rule when they say he erred, in the absence of a decision of a higher Iowa court.

II.

The Majority Opinion in This Eighth Circuit Is in Conflict with Opinions on the Same Subject in the Sixth Circuit, Liberty National Life Ins. Co., Inc., v. Hamilton, 237 F. 2d 235 (October, 1956), and with Opinions in the Second Circuit, Gaunt v. John Hancock Mutual Life Ins. Co., 160 F. 2d 599.

The Tennessee decisions involved in the Sixth, as to the insurance contract were more favorable to the insurance company than is the Iowa law; but the decisions of Iowa on the general principles of estoppel are the same as Tennessee. *Miller* v. *Lawlor,* 245 Iowa 1144, 66 S. W. 2d 267. Yet, where a Tennessee contract said in one sentence that no insurance was in force until the policy was issued, and said in another sentence words which one might take to mean that it was in force immediately, the Sixth Circuit applied the law of estoppel, and held that the company could not defeat that contract after insured died and it was too late for him to get other insurance. Yet, here the Eighth Circuit, a contract has written in ink "immediate coverage", and it contains no notice like the Tennessee one that a policy must be issued, and where one has every right to believe that if he is being charged premium during the interval of investigation, that he has the insurance that he is paying for—a much stronger case of estoppel than the Sixth Circuit, yet this Eighth Circuit ignores the Iowa law of estoppel, and relies on a case of a Utah contract that was so different that the case was not even in point.

The practical situation that exists throughout the whole United States that can be corrected only by certiorari herein is:

> "There is no way of getting any recent decisions on these insurance contracts on the applicable state

law because insurance companies are removing the trials to the Federal courts, who can only 'bathe the litigants in stale water' unless they can apply modern decisions on estoppel."

And then in the circuits we have conflicting decisions, as illustrated at bar, as follows:

"1. If plaintiff had sued in the Sixth Circuit, she would have lost in the trial court, and then got a directed verdict in her favor on the appeal;

2. But when she sued and the case could be removed to a court in the Eighth Circuit, she gets a verdict in her favor at the trial, and a directed verdict against her on appeal, plus a holding that the disputed evidence of defendant is conclusively true, and is thus deprived of a jury trial, as guaranteed under the 7th Amendment.

3. But if the case had remained in the Iowa courts she would have a directed verdict in her favor at the trial, no parol evidence would have been admitted to vary the delivered contract, Code, §511.34, would have been followed, and it would have been affirmed by the Iowa Supreme Court.

4. If the case had been in the Second Circuit plaintiff would have won, but on the ground of estoppel if Judge Clark had written the opinion, but on ground of strict compliance by the company with its own words, if some other judge wrote it."

Certiorari in this case is necessary to protect beneficiaries of such contracts, who are usually widows and orphans, who cannot afford the printing expense of long briefs and citations from everywhere as to the "weight of authority", when if we can get a uniform decision of the circuits, the insurance companies will not burden the Federal courts with removal, and the briefs will be short and

to the point on state decisions, and there will not be the hazard as to the forum, and the correct ruling for all the circuits is, that the law of estoppel is alike everywhere, and that when an insurance company allows a man to go to his death believing his wife and children are provided for, that they are thereafter estopped to claim otherwise, and more especially so, when they have charged him a premium over the interim so that if he lives and gets a policy he has to pay premium for the interim after it is conclusive that he did not need insurance during that period, but if it is determined during that period that he *did need* it, then the insurance company can prove he does not have it. Mere sense of equity dictates that the universal law of estoppel should apply after he is dead, and the Iowa court would have applied it in the Reynolds case but for the Iowa rule that estoppel must be pleaded. Plaintiff did plead estoppel here.

Federal courts should have a uniform holding that when an insurance company has set up a situation whereby it has the power to charge a man for interim insurance if he lives and gets a policy, but if he dies he does not have insurance, *i. e.*, if he does not need insurance he has to pay for it, but if he needs it he does not have it, is inequitable, and the courts will not assist in such a game as "heads I win, tails you lose". A practical situation, as illustrated herein: Usually the dealing is between the insurance agent and a man at the trial deceased. Such puts it in the power of the agent to testify to anything he chooses, and no one alive can contradict him. In this case it so happened that two witnesses did contradict him on all the details of what occurred in Hinkle's office.

At least the Federal courts should have a uniform rule, that when the other party to a transaction is dead, the testimony of the insurance agents is not conclusively true

even if it is not contradicted; and where as here, it was contradicted, the Federal courts should not do as the majority opinion did herein and hold the agent's testimony is conclusively true. Also, even if there were no statute like Iowa Code, Sec. 511.34, the fact the agent did not give insured a copy of his application opens the door to fraud too much, gives every insurance company absolute power to falsify applications, and thus to defeat a man whose lips have been sealed in death. The Federal rule should be that the failure of the insurance agent to deliver insured a copy of his application shows such a lack of good faith, as to make that agent's testimony, not conclusively true, as held herein, but always a jury question even when it is not contradicted by the circumstances.

III.

Court of Appeals Violated Plaintiff's Rights under 5th and 7th Amendments.

Compared with the record of the issues, grounds stated in the motion for directed verdict, and errors assigned and argued on appeal, the opinion in ordering a directed verdict for defendant, is a violation of plaintiff's right under the 5th Amendment to the U. S. Constitution to due process of law. It is not due process to try a law action *de novo* on appeal, and to hold the defendant's evidence conclusively showed something defendant never claimed in pleading, evidence, or errors argued, denies a jury trial, and is not the "course of the common law."

Also, when the trial court admitted evidence over plaintiff's objection in violation of the parol evidence rule, and of Iowa Code, Sec. 511.34, under a ruling that he would take care of it in his instructions, that part of the opinion that holds such evidence was conclusively true and orders a directed verdict for defendant thereon, violates plaintiff's

rights to due process of law under the aforesaid amendment.

The Court of Appeals denied plaintiff a jury trial as guaranteed to her by the 7th Amendment to the U. S. Constitution, by holding that evidence offered by defendant of a transaction with a man deceased at the time of the trial was conclusively true, and more especially so when defendant's witness was contradicted on all his details by two other witnesses, and when the physical appearance of defendant's exhibits contradicted defendant's witness, and where the facts testified to were contrary to human nature.

IV.

A Removal by a Corporation Does Not Fall Within the Judicial Power of the United States, and the Trial Court Erred in Overruling Plaintiff's Motion to Remand, As a Corporation Is Not a Citizen of Any State, and the Case Is Not "Between Citizens of Different States".

The platitude followed since 1844 has no basis in law when applied to *Removals*. Letson case does not permit *Removals*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

(1) Procedural due process of law—"* * * nor be deprived of * * * property without due process of law." 5th Amendment to the U. S. Constitution.

(2) "In suits at common law, * * * the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law." Amendment 7, U. S. Constitution.

(3) "The Judicial Power of the United States * * * shall extend * * * to controversies * * * between citizens of different states * * *" Article III, section 2, U. S. Constitution.

Iowa Code regulating life insurance companies in substance provides the company must attach to the policy "or of the contract of insurance" any application that "in any manner affects the validity." Iowa Code, Sec. 511.33.

Sec. 511.34, Iowa Code, provides in substance, neglect to comply with above section, the company "shall forever be precluded from pleading, alleging or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in an action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

STATEMENT OF THE CASE.

On February 25, 1955, defendant executed and delivered to Max Hinkle in Iowa a contract of life insurance, as follows:

CONDITIONAL RECEIPT

DO NOT DESTROY

Received Twenty One and 70/100 Dollars in connection with an Application made this day to the New England Mutual Life Insurance Company, of Boston, Massachusetts,

for Insurance of $10,500 on the life of W. Max Hinkle

Immediate Coverage

The Insurance applied for shall be in full force and effect from this date, provided the Proposed In-

sured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft given in payment of this premium is not paid on presentation, this receipt shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Countersigned 2/25 1955

Philip C. Raye
Secretary

Rodney Bliss, Jr., General Agent

If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt the premium will be refunded.

At that time Hinkle signed an application form prepared by defendant, primarily in blank at the request of defendant's agent, who intended to fill out the blank spaces later. No copy of the application was delivered to Hinkle. The delivered contract was detached from the form, and was delivered as a complete contract in itself. At that time the "General Agent" of defendant wrote on the delivered contract in ink the words "immediate coverage," before delivering it. At the trial defendant produced the application and offered it in evidence over the objection of plaintiff that it violated the parol evidence rule and defendant was prohibited by Iowa Code, Sec. 511.34, from

making any use of it because no copy of it was delivered to insured. The court ruled that he would take care of it on the instructions (Record p. 32). There was dispute in the evidence thereafter as to whether the agent wrote false answers concerning Hinkle's pilot's license into the application after Hinkle died, or whether Hinkle told him false answers to the questions concerning being a pilot. A view of this application is important for plaintiff claims that it shows on its face that those false answers were written under different conditions than the other writing appears. It was not disputed that all handwriting on the application was that of Agent Bliss, except Hinkle's signature. Two witnesses who saw Bliss writing said Hinkle's desk was so crowded that Bliss wrote on a pull out board. Bliss denied this. We mention this dispute in testimony because the appellate court held the trial judge erred in not directing a verdict for defendant on all this disputed testimony. The jury could well have found that those false answers were put on that application after the agent learned of Hinkle's death. At the time defendant put this application in evidence it was still blank as to the essential information, such as "amount, plan, and rating applied for."

The above is important because the Court of Appeals based its opinion of reversal on the defeasance clause of the contract, which read as follows:

> "*but if the Company determines* that the Proposed Insured is not insurable,* (for the amount, plan, and rating applied for) said application shall be declined and the amount paid will be refunded upon return of this receipt".
>
> *(This part is taken by reference from the clause above it.)

and held the evidence conclusively showed Hinkle was not insurable for the "amount, plan, and rating applied

for", in the face of the application being absolutely blank as every one of these three things, and in spite of the fact the vice president of defendant testified that Hinkle was insurable for every plan they had and for any amount they had (Record p. 49). The first clause of the receipt said: "The insurance applied for shall be in full force from this date, provided, he is in good health", etc.

Going back now to the time of delivery of the "receipt", defendant's agent called its examining physician on Hinkle's phone, and the examination was set for the following Monday at 11:45 a.m. There is conflict in the evidence as to why this was. Mrs. Hanson, a stenographer who heard the conversation, testified that Bliss told Hinkle the doctor had said over the phone that he could not examine him until Monday, whereas Bliss testified Hinkle was the one who requested that the examination be set for Monday. Both courts held that the fact that it was set for Monday was the important thing, and it was not material who requested it, as by agreeing to it such condition was waived until Monday, and after that it was excused because of impossibility. This contract was made and dated on Friday, February 25, 1955. Hinkle was killed the next day.

It was the custom of Mr. Hinkle to fly his own airplane to Omaha, Nebraska, on Saturday mornings to give instruction in flying to the Iowa-Nebraska Air National Guard, of which he was an officer.

On Saturday, February 26, he got up before his wife did, got his own breakfast and left for the airport. When Mrs. Hinkle went to the kitchen for her breakfast she found this contract in suit on the kitchen table where her husband had put it as he left for the airport. This fact is important for it shows defendant led Hinkle, until after it was too late, to believe he had protected his wife and

children with insurance. It supports plaintiff's express pleading of estoppel. About 8 o'clock Saturday morning, after Mrs. Hinkle had found this "receipt" on the kitchen table, her neighbors came with the news that her husband had been killed.

About two weeks after Hinkle's death, the General Agent of defendant called Mrs. Hinkle and denied liability on the contract, on the ground that Hinkle had not had a physical examination. At no time since Hinkle died did defendant take any steps to exercise their power under the defeasance clause to avoid their contract.

After denying liability for an invalid reason, defendant's agent did write Mrs. Hinkle a letter on May 19, 1955, almost 4 months after Hinkle died, in which he enclosed the check, but the letter gave no reason for same in addition to what he had already told her on the phone. The defeasance clause required them to determine in their customary manner whether to issue a policy, then to return the premium on the ground that they had so determined, and to get the receipt back. They did none of these three requirements. We mention this because the appellate court held on page 16 of the opinion that defendant made a determination that Hinkle was not "so insurable". The fact was, defendant claimed the agent had never sent the application to the home office. All they ever did was to bluff the widow into a belief there was no contract. They never made a determination as required by the two Iowa decisions we cite, at the home office by the proper committee, and in the usual course of time for such determination.

Plaintiff's pleading was in the alternative, either as administratrix, or as beneficiary, and pleaded the contract as unconditional because of the words in ink, "immediate coverage", and if such did not supersede the con-

ditions, then sought recovery on it as a conditional contract. In its answer defendant failed to put performance of the condition of good health, in issue in that it did not comply with Federal Rule 9(c), which requires "A denial of performance or occurrence shall be made specifically and with particularity". Instead of complying with that rule defendant pleaded that it did not have knowledge as to his good health. However, the trial court submitted the question of health to the jury under an instruction that there was sufficient evidence of good health, that the jury should consider the circumstances, the presumptions, and the medical examination when his pilot's license was renewed, which was in evidence. No objections were taken by the defendant to any of the court's instructions to the jury. No motion for directed verdict was made by defendant at the close of plaintiff's evidence. At the close of all the evidence defendant made its first and only motion for directed verdict, on the grounds stated therein. It did not contain any ground concerning good health, and did not contain any ground to the effect that they had performed the defeasance clause. Their basic theory was that it was only an unaccepted offer, and they did not have to avoid it.

The answer of defendant pleaded as defenses: 1. that no contract ever existed because it was an offer that had never been accepted; 2. that they had never received the report of the medical examiner mentioned in the second proviso (Both courts held against them on this as it was the fault of this agent.); 3. that the agent had no authority to write on the receipt "immediate coverage"; 4. that defendant violated an Iowa statute by dating the contract prior to a physical; 5. that Hinkle misrepresented his pilot's license, etc., and was thus not insurable—no allegation that they had determined such fact in the time, manner

and by whom, as required in the Iowa decisions, *supra*. As to the defenses, that he was not insurable "for the amount, plan and rating applied for", the application was blank as to those three facts. The trial court held defendant had not established any of its defenses and that if Hinkle was in good health on the date of the application plaintiff was entitled to recover, and submitted that fact to the jury. No objection was taken to this and no error assigned on it. See Iowa decisions on, "mending his hold" *ante*.

To comply with Iowa procedure plaintiff pleaded facts which worked an estoppel on defendant as to defenses pleaded by defendant. This pleading is printed in Record pp. 24-28.

We mention this fact because the Iowa decisions concerning the apparent authority of the agent to waive conditions and promise immediate coverage, are based upon the fact they are charging premium over this interim, and the reasons stated in those opinions show that it is on the ground of estoppel; and what the Iowa decisions on "apparent authority" actually hold is that when the insurance company has the power to charge a premium for the interim, it is estopped from claiming there was no insurance during that period.

Defendant's evidence, including the application, shows conclusively that defendant would have dated the policy the date of the application (Record p. 49), and had printed on the application that the due date of the premium was the date of the "receipt", not the policy, that is, they charged premium over the interim.

The trial court got both parties to agree that Mrs. Hinkle should recover as beneficiary, rather than as administratrix, to simplify the instructions. The trial court

overruled defendant's motion directed verdict, and submitted the case to the jury under instructions. Defendant did not object to any of the instructions. The jury returned a verdict for plaintiff, and the court entered judgment thereon, which judgment is printed on Record p. 70. Thereafter defendant made Motion for Judgment Notwithstanding Verdict, on the ground of lack of sufficient evidence of good health of Hinkle. The court overruled this motion. There is no such motion in the Federal Rules, and if there were it lies to defects in pleading, not to defects in evidence, and is not "according to the course of the common law". See 7th Amendment.

Thereafter defendant appealed and argued specified grounds of error as to why his motion for directed verdict should have been sustained, none of which was that it had performed the defeasance clause. The Court of Appeals ordered a verdict directed for defendant on a ground not raised or argued. The dissenting opinion thought defendant was estopped under Iowa decisions to set up each and all defenses it claimed. The majority ignored the Iowa decisions. Plaintiff petitioned for rehearing, mentioning the above Iowa decisions, and other omissions, and asserted the opinion violated her rights under the 5th and 7th Amendments, and called attention to the fact plaintiff had pleaded and proved an estoppel under the Iowa decisions on estoppel on defenses claimed by defendant. Such petition was immediately denied.

BASIS OF FEDERAL JURISDICTION.

Plaintiff filed her petition in the Iowa state court of original jurisdiction. Defendant in due time removed the case from the state court to the Federal District Court, stating that plaintiff was a citizen of Iowa, and defendant was

incorporated in Massachusetts. Plaintiff filed Motion to Remand, in which she pleaded that defendant was not a citizen of Massachusetts, or any state, and that 11,000 shareholders of defendant were citizens of Iowa, the same state as plaintiff, and offered the certificate of the Insurance Commissioner of Iowa to prove it. The court ordered briefs filed on the subject. The court eventually overruled the Motion to Remand, and the ruling is in Appendix, p. A1. Defendant is estopped from claiming there is no Federal jurisdiction. Plaintiff does not want to claim it if the Court will reinstate the judgment of the District Court.

ARGUMENT.

The only defense seriously urged by defendant was that no contract ever existed because the "receipt" was an offer, and could only be accepted by the committee headed by Second Vice President Arnold; that such committee had never passed upon it (See Record pp. 46, 47). They used this witness, Arnold, to prove that the authorized committee had never passed upon Hinkle's insurability. Two weeks after Hinkle's death Bliss, General Agent for Iowa, called the beneficiary and told her they would not pay because Hinkle had not had a physical examination (Record p. 29). For four months, and until May 19, 1955, Bliss kept bluffing her into a belief there was no contract of insurance, and on such date mailed the premium check to her, stating no reason. If we believe defendant's witnesses, the agent never sent the application to the home office, but relied upon his skill in bluffing this little woman into believing there was no contract.

The insuring clause of the "receipt" was, "the insurance applied for shall be in effect from this date" provided

he is in good health; and the defeasance clause was, "but *if the company determines* that the proposed insured is not so insurable, said application shall be declined", etc. There was an intervening condition between the insuring and defeasance clauses "provided" the report of the medical examiner is received in the home office, etc. Both courts held this "proviso" (condition) was excused because defendant had prevented it from occurring by setting the medical examination for Monday.

Thus the gist of the case is, what does it take under the Iowa decisions for defendant to perform this defeasance clause and thus work a forfeiture of this contract? The trial court thought that under the Iowa decisions, and the evidence of Vice President Arnold, that the "determination" as to whether Hinkle was insurable, etc., had to be performed in the home office in Boston by the proper committee, and that under the Iowa rule of "mending his hold" the company had to do this before they had assigned some other excuse for not performing their contract. Such is the Iowa law as announced by decisions of the highest court of Iowa. *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 314, 103 N. W. 207, and approved recently in *Craddock* v. *Life Assn.*, 225 Iowa 744, 285 N. W. 169. The appellate court reversed on this ground, and reached its conclusion as to what the Iowa law was by lengthy quotations from cases decided from almost everywhere, Missouri, Utah, Tenth Circuit, New York, and many others, which appear on pages A10, A11, A14, A15 of the majority opinion. They did mention the Reynolds case from Iowa, and then failed to follow it. They ignored completely the other Iowa decisions, and when reminded on Rehearing, refused to let it be decided by the full bench. They quoted from appellant's brief, which was 61 pages of citations and quotations, from decisions other than Iowa, try-

ing to prove what the "weight of authority" was. The correct Iowa law was quoted in Appellee's Brief, page 23, from the Reynolds case as follows:

> "but if the company, IN THE PROPER EXERCISE of its legal rights under the law and contract, which it is unnecessary for us to define in this opinion, REJECTS THE APPLICATION, *upon the ground that the applicant is not insurable*, and returns the premium paid, no liability can arise thereunder."

The reason it was unnecessary for the court to define what the proper method of passing on insurability in the Reynolds case was, that in that case there was no dispute but that the proper committee in the home office had followed the company's usual procedure in the proper course of time and in its regular order, and had determined that that applicant was not insurable, but before they had made their final decision they learned of applicant's death from heart disease, which they had already determined from independent rating agencies he had. There was no question there but that they had followed their usual procedure of passing on applications. There was no pleading or other claim of estoppel in that case, and the court did not pass upon any law of estoppel. The Iowa court merely held that the company could continue and complete their usual procedure they had started before his death, and make the final determination even after his death. But the Eighth Circuit holds herein, that because of the other non-Iowa cases cited and quoted from by the majority opinion, this defendant did not have to follow the procedure called for in the Reynolds opinion. And it also refused to follow the additional Iowa decision of *Farmers Milling Co.* v. *Ins. Co., supra*, which holds that an insurance company cannot avoid a contract by performing the terms of the defeasance clause after it has previously given some

other excuse for not performing it, *i. e.*, the Iowa doctrine of "mending his hold". This *Farmers'* case, *supra*, further holds that the secretary of the company is not the proper one to perform the defeasance clause, but it must be passed upon in the usual course by the board of directors, or whatever functionary is provided by the by-laws, which in the case at bar would be the committee at the home office that passes on applications, as testified to by the vice president on page 47 of the Record.

Another reason pleaded by defendant that there was no contract was, defendant claimed it violated an Iowa statute for the regulation of insurance companies that said in effect that no insurance company should issue a policy for over $10,000 that did not contemplate a physical examination. The trial court ignored this defense for three reasons: (1) the statute did not make the contract void, (2) this contract was not a violation of the statute, and if it were, (3) defendant could not claim the benefit of its own wrong. The appellate court thought it was unnecessary to pass upon this statute because they were reversing anyway, but in so doing indicated it would not follow the Iowa decisions on estoppel. Plaintiff had pleaded at length the facts of estoppel on this point and had argued fully that by printing these contracts for use in Iowa defendant either interpreted the statute to permit what defendant was doing, or had willfully violated it, that they had misled Hinkle, and could not claim the benefit of defendant's own wrong, which the majority impliedly indicates it will do. We cannot afford this certiorari, to say nothing of a second one.

On page A18, the majority opinion says, "There was no time for investigation prior to the applicant's death." Defendant knew when it printed these contract forms such might be the case of any applicant. Insurance companies

dictate their own contracts, and under Iowa decisions they must follow them the way they print them, and follow them strictly. By the part of the opinion quoted above, the majority refused to follow other Iowa decisions to the effect that such contracts are to be followed strictly the way the insurance companies draft them, and that every intendment is against a forfeiture, as represented by *Temple* v. *Fraternal Bankers Reserve*, 179 Iowa 65, 161 N. W. 102. However that may be, there was plenty of time after Hinkle's death before they assigned some other reason, to perform strictly the defeasance clause, if the Reynolds case is liberally construed. If instead of bluffing the little woman with some other excuse the company had taken the position that this "receipt" was a contract, instead of claiming it was only an unaccepted offer, and had proceeded to comply literally with the defeasance clause, it might have avoided the contract under the rule in the Reynolds case. But surely one is not avoiding a contract when he puts in his time insisting that it is merely an offer. The defendant's Answer is incompatible with the above expression of the majority opinion.

While it is true under the present rules of civil procedure, both Iowa and Federal, a defendant may plead inconsistent defenses, it seems not due process of law for an appellate court to hold "evidence conclusively shows * * * defendant made a good faith determination that he was not insurable," when defendant failed to plead or prove that he made such determination when he was permitted to so plead, and when his pleading and proof was directed to the point that no such determination was required because no contract had ever come into existence.

I.

Violation of Erie Rule.

We submit, the Court of Appeals violated the Erie rule when it went outside of Iowa for its quotations, and failed to follow the three Iowa decisions we cite herein, contained in 187 Iowa, Reynolds; 127 Iowa, Farmers Mill. Co.; and 179 Iowa, Temple case, and that the trial court was correct when he did follow them, and that it was error to reverse the trial court, and the majority opinion was not "the course of the common law."

B. The majority opinion's view of the effect of the words "immediate coverage" written in ink by the insurance agent, falls also under the Erie rule, which we have sufficiently pointed out under Questions Presented. If they had read the Iowa cases we cited, they would have found that there is an element of estoppel, which the Iowa court calls apparent authority, that is binding on a Federal court in a diversity case, or that by charging a premium over the interim, they have impliedly promised the man that he has what he is paying for.

C. The trial court in a colloquy with defendant's attorney made some remarks in the absence of the jury which the Court of Appeals holds was error. We have adequately presented that in our Questions Presented, *ante*. The majority opinion violates the Erie rule on this also. The matter had no bearing on the outcome of the law suit.

II.

The Majority Opinion Is in Conflict with Opinions in the Sixth and Second Circuits, and the Federal Cases Cited, Ante.

In the case that came up from Tennessee in the Sixth, the insuring clause at one place said the insurance was

not effective until a policy was issued, but at another it could have been construed to lead the applicant to believe it was effective at once. In the receipt at bar there was no mention that it was not effective until a policy was issued, but the insuring clause states it is, "effective as of this date," etc. Charging a premium during the interim would lead Hinkle to believe he was getting what he paid for. If Hinkle believed he was in good health, he had a right to believe he had immediate insurance, whereas in the Tennessee contract the insured had some notice that maybe he did not have insurance until he got a policy. But the Sixth Circuit held that even with this notice, the insurance company was liable unless they notified him before his death that he was not insurable. That means that if he went to his death believing he had insurance, they are estopped to claim otherwise after it is too late for him to protect himself. They held the insurance company to a strict compliance with the contract the way they printed it.

The Iowa cases on estoppel are the same or stronger than those of Tennessee, although there are no Iowa cases on all fours with this receipt that mention estoppel. But the general law of estoppel is, if you cause a man to believe or rely on any fact until it is too late for him to protect himself, you are estopped from claiming that such fact does not exist. An extreme example of how far Iowa uses estoppel in its decisions is *Miller* v. *Lawlor*, 245 Iowa 1144, 66 N. W. 2d 267, decided in 1954. The dissenting opinion, as well as plaintiff's pleadings shown from pages 23 to 28 of the printed Record, called attention to estoppel; but the majority opinion refused to apply that part of the Iowa decision, as the Sixth Circuit did.

It is no answer to the above that the Reynolds case did not mention estoppel. No estoppel was pleaded there,

as it was here, and the Iowa law is that estoppel is not available unless it is put in issue by the pleadings. Under the general decisions as to estoppel in Iowa, perhaps if that had been raised by the pleading in Reynolds the court would have held insured was misled. The dissenting opinion herein held the same as the Sixth Circuit. We submit that the majority opinion has refused to follow the Iowa decisions on estoppel, since estoppel was pleaded by this plaintiff as to each defense pleaded by defendant.

We further submit that under present conditions, unless the situation throughout the United States is corrected by certiorari herein, whether one can recover on these interim contracts depends upon which Circuit the appeal falls in, the details of which are pointed out in our statement of the Questions Presented, *ante*. Justice should be certain and uniform in the Federal courts, and not depend on mere chance of the tribunal.

III.

Violates Plaintiffs' Rights under 5th and 7th Amendments.

The appellate court held the trial court was in error (Opinion, p. A17) for not sustaining defendant's motion for a directed verdict on a ground that was not mentioned in the motion, not assigned as error on appeal, and the opposite fact was claimed and proved by defendant's evidence, namely that defendant had determined Hinkle was not insurable. The error assigned was, the court erred in not sustaining motion for directed verdict on four stated reasons. Their motion never claimed they had determined he was not insurable, as required by the last proviso of the contract; their pleadings never claimed it, and their evidence refuted it (Record, p. 48). Their only serious defense was that it was only an offer until they accepted it,

and that their committee had never passed on it, and thus no acceptance. In a law action, when the appeals court goes beyond the errors assigned and reverses a trial court on a matter that was never raised or claimed, such is not due process of law. The constitutional question was raised in petition for rehearing, and denied.

Thus on page A18, the majority opinion states that the evidence conclusively shows defendant made a good faith determination that because of his aviation record Hinkle was not insurable for the rate, etc., applied for, and on page A18 says the delay in the "investigation was not prejudicial to plaintiff", in the face of defendant's own evidence and pleading that the "receipt" was not a contract because never accepted and the company had never received it at its home office (Record, p. 47): The Iowa decisions cited herein hold such does constitute prejudice to any plaintiff, that commencing suit based on one excuse for non-performance and thus jeopardy of costs, is such prejudice to plaintiff as to preclude determination by a defendant of a different excuse after suit is commenced. Prejudice, however, is not necessary because making a good faith determination in the regular channels was the only way defendant could escape the terms they had themselves dictated. The quoted part of the opinion above violates the Iowa law as announced in *Reynolds, supra,* and other Iowa cases, *supra,* and in addition passes on a ground for directed verdict not mentioned in the Motion for Directed Verdict. The Motion, Paragraph 9, makes no claim of determining insurability, but only that "he was not insurable under defendant's underwriting rules". To go outside the grounds stated in the motion and hold a trial court erred in not sustaining the motion on some ground not mentioned therein, is not due process of law. A trial court does not err, if none of the grounds stated in the

motion are grounds to sustain it, when he overrules it. And it is not due process of law for the appellate court to try a different law suit than the one presented.

The nearest the motion got to the ground of reversal is paragraph 3 thereof, which says "this provision requires a determination by the company of insurability, and negatives a construction of the receipt as being a contract of temporary insurance". The court had on page A11 mentioned the Reynolds case, and had held that under that case the receipt *was* a contract, and was not ambiguous. So all paragraph 3 amounted to, was a contention that there was no contract or that it was ambiguous.

There was nothing in the motion to justify the last quoted part of the opinion, and if the court had in mind paragraph 3 of the motion, the Reynolds case in Iowa had determined that point against defendant. Thus either the court abandoned the rule in the Iowa cases, or it sustained the Motion on some ground not stated therein. If it is the first, it violated the Erie Rule, if it is the second, it is not due process of law. Also on page A14 the opinion states the trial court erred because it took the position good health and insurability were synonymous, in a colloquy with defendant's attorney. The only error assigned was he should have directed a verdict for four named reasons and this colloquy was not assigned as one of them. It is not due process for the appellate court to pass on errors not assigned and which were not raised by the motion that the trial court overruled, and that had no bearing upon the outcome of the law suit.

The trial court admitted in evidence over plaintiffs' objection the application defendant produced. It was still primarily blank, although Hinkle's signature appeared upon it. No copy had been delivered to Hinkle, and the

Iowa Code prohibits the use for any purpose of such an application by an insurance company. The purpose was to prove Hinkle misrepresented his airplane and pilot's activities. By the Iowa case cited above, such is immaterial unless the company *determines* that the applicant is for such reason not insurable before it gives some other reason for not performing the contract, so the trial court later treated it as immaterial. Plaintiff proved, however, by two witnesses who were in the room at the time the application was taken by Bliss, circumstances which would at least leave a jury question that Bliss wrote those false answers into the application after he learned that Hinkle had been killed. The opinion holds Bliss's testimony is conclusively true. This denies plaintiff a jury trial on an issue of fact. The circumstances so completely refuted Bliss's testimony as to make it unreasonable.

Passing on matters as stated above not claimed in the pleadings or in the errors assigned, and holding disputed evidence "conclusively" true in a law action on appeal, is not due process, and is not "by the course of the common law", and denies a jury trial.

The opinion refused to pass on two matters argued with the inference in each that the trial court erred as to them: (1) As to whether appellant could raise for the first time after trial a question as to sufficiency of evidence that Hinkle was in good health. The court instructed the jury that there was sufficient evidence of good health. No objection was made to the instruction. Defendant's motion for directed verdict did not mention insufficiency of health evidence as a ground. Defendant's answer did not put the question of health in issue, and it did not deny plaintiff's allegation of good health, but stated merely that defendant had no knowledge of such fact. Rule 9 requires a defendant in denying a condition to have such knowledge

and to plead it specifically and "with particularity". To infer the trial court erred on a matter not in issue is not due process.

(2) The opinion infers that if it were necessary the appellate court would hold that defendant could use as a defense the fact that it deliberately violated an Iowa statute, and that issuing this contract in Iowa might be a violation, although there are no Iowa cases so holding. The Iowa law is plain that one can not claim the benefit of his own wrong, if there were any wrong. The trial court determined that and no objection was made to his instructions.

We mention all of the above because it shows the attitude of the two writers of the majority opinion, which together with their refusal to let the rehearing petition go before the full bench, shows on its face that plaintiff was deprived of her judgment without due process, and that the majority procedure was not by the course of the common law, as required by the 7th Amendment.

IV.

No Federal Jurisdiction in Foreign Corporation Removal Cases.

Any act of Congress allowing removal by a corporation of any case because it could have been *commenced* by the plaintiff in a Federal court is void as an attempt to expand the Judicial Power of the United States beyond that fixed by the Constitution.

Ever since 1844 there has existed a platitude that a foreign corporation could remove a case against a citizen of the state who elected to commence it in a state court. This platitude is based on an erroneous application of what was held in *Louisville C. & R. Co.* v. *Letson*, 2 How. 497. The reason the court gave therein precludes *removal* by a

corporation, rather than sustains removal. A natural person had sued a foreign corporation in a Federal court, and the corporation tried to defeat that right of the plaintiff to choose a Federal court. The Supreme Court held that although it was not a citizen of any state, and thus no diversity, a corporation could not plead its artificiality or lack of citizenship to defeat the right of a natural citizen to elect his tribunal. To do so would give a non-citizen an advantage over a citizen, and thus indulge the fiction that all its stockholders were citizens of the state of its incorporation—a type of estoppel. To apply that same fiction to the opposite situation where the plaintiff had elected the *state* court as her tribunal and to permit the corporation to remove the case to a court of *its* choosing, violates the very thing the court was trying to prevent; it enables the corporation to take advantage of its artificiality and non-citizenship to defeat the rights of the natural person to elect to use the *state* courts. We find no decisions since 1844 passing upon the point we raise here. Since that time, however, it has been decided that a conclusive presumption is not due process; fictions have been said to be "an unconstitutional assumption which no lapse of time should make us hesitate to correct"; 139 F. 2d 1003; the reasoning is "examples of Marshall's time that are not sound under modern conditions", 337 U. S. 618; and is analyzed and refuted in 26 Harvard L. R. 853, 683, 885.

It would be a travesty on justice if this little woman would have to pay all this printing bill, unnecessarily large because appellant and the majority opinion wish to discuss the "weight of authority", and then get no result for these terrific costs, because defendant has tried to wear her out in a court that has no removal jurisdiction, so we do not push this too much, but we do not wish to defeat the right of the Federal government to protect itself from needless

work on cases over which it has no jurisdiction, nor to protect other widows and orphans from being defeated of their rights to have their litigation decided in the state courts where they will have to print arguments on state law only.

At the outset of the Record we signed a stipulation prepared by opposing counsel that there was Federal jurisdiction, to make unnecessary printing the record of this remand motion. We do not wish to violate that agreement; but we do not wish to preclude the court from protecting itself, nor do we wish to do what Congress has no power to do, and confer jurisdiction beyond that fixed by the Constitution.

If we are wrong about the Iowa decisions pointed out herein, then the case should be remanded with direction to sustain the motion to remand to the state court, at *defendant's costs* for causing all this Federal printing; but if we are right as to the Iowa decisions, we trust the court will find a way to give us the fruits of our labors, and order the Court of Appeals to affirm the judgment of the District Court. If there is Federal jurisdiction, uniformity requires that all Circuits follow the Sixth, and be required to apply the ordinary law of estoppel of the state involved, as advocated by the dissenting opinion herein.

We submit, that under the Iowa decisions cited herein, the trial court followed the Iowa decisions, the Court of Appeals reversed on an error not raised, and not in conformity with Iowa decisions, denied plaintiff's right to a jury trial, violated procedural due process of law, and this Court should order the Court of Appeals to affirm the judgment of the District Court.

Respectfully submitted,

LELAND S. FORREST,
Attorney for Petitioners.

United States District Court

SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION.

Filed March 3, 1956.

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle,
Plaintiffs,

vs.

New England Mutual Life Insurand Company, of Boston, Massachusetts,
Defendant.

Civil No. 3-659.

Order.

Upon consideration of plaintiffs' motion for remand of this action to the District Court of Iowa in and for Polk County, on the ground of lack of requisite diversity of citizenship between the parties hereto, and as stated in the court's memorandum filed herewith;

It is Ordered that plaintiffs' motion for remand be and the same is hereby overruled and denied.

Signed at Des Moines, Iowa, this 3rd day of March, 1956.

/s/ Roy W. Harper,
United States District Judge
By Assignment.

Judgment of the District Court.

Appears in full in Record pages 70 to 72.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 15,740

New England Mutual Life Insurance Company of Boston, Massachusetts,

Appellant,

v.

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle,

Appellees.

} Appeal from the United States District Court for the Southern District of Iowa.

[November 5, 1957.]

Phineas M. Henry (Ralph A. Church and Luther L. Hill, Jr., were with him on the brief) for Appellant.

Leland S. Forrest for Appellees.

Before SANBORN, WOODROUGH, and VAN OOSTERHOUT, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Defendant insurance company has appealed from a judgment entered against it upon an alleged contract of

temporary life insurance. Jurisdiction based upon diversity of citienship is established.

Rodney Bliss, Jr., general agent of the defendant, learned that W. Max Hinkle had made a mortgage upon his home. Hinkle was service and parts manager for the Onthank Company. Bliss, on February 25, 1955, called upon Hinkle at Hinkle's place of employment to sell him insurance. Defendant's decreasing term policy was fully explained to Hinkle. The policy discussed afforded initial insurance coverage of $10,500 with coverage declining at the rate of $500 per year. Hinkle signed a written application for such a policy at standard rates and paid by check the initial quarterly premium. Thereupon, he was given a conditional receipt reading as follows:

"CONDITIONAL RECEIPT. DO NOT DESTROY.

Received Twenty-one and 70/100 Dollars in connection with an Application made this day to the New England Mutual Life Insurance Company, of Boston, Massachusetts, for Insurance of $10,500 on the life of W. Max Hinkle.

Immediate Coverage

"The insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft given in payment of this premium is not paid on presentation, this receipt

shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Philip C. Raye, *Secretary.*

Countersigned 2-25, 1955.

Rodney Bliss, Jr., General Agent.

If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt, the premium will be refunded."

The above receipt is upon a regularly printed form of defendant. The name of the proposed insured, the amount of insurance, the premium, and the date were filled in by Bliss. Bliss also wrote in the words "Immediate Coverage" appearing in the receipt. He signed the receipt as general agent and delivered it to Hinkle.

It was understood between Bliss and Hinkle that Hinkle was to submit to a medical examination by the company's medical examiner. An appointment for such medical examination was made for February 28, 1955. There is a conflict in evidence whether the medical examination was deferred to February 28 to suit Hinkle's convenience or that of the company's doctor. Hinkle was killed on February 26, 1955, when the plane which he was operating crashed near Des Moines.

Plaintiff, Maxine K. Hinkle, widow of insured, brought this action individually, as beneficiary, and as administratrix of Hinkle's estate, alleging that defendant had assumed insurance coverage upon Hinkle because of the words "immediate coverage" written in the receipt by the agent, Bliss; and that, if such is not the situation, there is a conditional liabilty on the part of the insurer, and that all the conditions had been performed or excused or pre-

vented from occurring by the defendant. The court submitted to the jury only the claim asserted by the plaintiff individually as beneficiary. Mrs. Hinkle was designated as beneficiary in the application and was entitled to recover if at all as beneficiary.

Defendant at the close of the evidence made a motion for directed verdict which was overruled. The motion is set out in a footnote.[1] The jury found for the plaintiff

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[1]Motion for Directed Verdict.

Now then at the close of the evidence the defendant moves the court to direct the jury to return a verdict for the defendant on Count IV of the petition on the following grounds:

1. The conditional receipt offered in evidence, and alleged to be a contract of insurance is not a contract, but a receipt delivered to evidence the payment of a first premium in connection with an application for life insurance, and the terms upon which the first premium was paid. It was merely a part of a transaction which constituted an application for life insurance. Said application was not completed and was not accepted by the defendant, and there was no meeting of the minds of the parties to form a contract.

2. The said conditional receipt was conditioned upon the receipt of satisfactory evidence at the home office in Boston that the proposed insured was insurable for the amount, plan and rating applied for. It appears from the record that no such evidence was sent to the home office of the defendant at Boston or received by it there, and in fact, no such evidence could have been furnished by the proposed insured in view of his aviation record.

3. The conditional receipt contemplated and expressly provided in the third clause of the printed matter therein "If the company determines that the proposed insured is not so insurable, said application shall be declined and the amount paid will be refunded upon return of this receipt." This provision requires and contemplates a determination by the company as to the insurability of the proposed insured for the amount, plan and rating applied for, and, provided that, if the company determines that the proposed insured is not so insurable, the application will be declined: that this provision negatives the construction of the receipt as being in itself a contract for temporary insurance.

4. The insertion of the words "immediate coverage" below the amount of insurance applied for in the conditional receipt does not convert the receipt into a contract of temporary insurance in view of the fact that a decreasing term policy was applied for,

and judgment for plaintiff was entered. Defendant filed a timely motion for judgment n.o.v., restating the grounds urged in his motion for directed verdict and adding a new ground as follows:

> "The defendant also moves the court for judgment in its favor notwithstanding the verdict on the ground that there was no evidence in the record to support a verdict for the plaintiff on the issue of fact submitted to the jury by the court, namely the good health of W. Max Hinkle on February 25, 1955, and that on that issue alone a verdict should have been directed for the defendant."

This appeal is based upon defendant's contention that the court erred in overruling its motions for directed verdict

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and the proposed insured was advised that the amount of insurance in the first year was $10,500, and would decrease annually thereafter.

5. If said receipt is construed to be a contract of insurance because of the addition of the words "immediate coverage" under the amount of insurance applied for, said contract is not binding on the defendant because the agent, Bliss, had no authority to make, alter or discharge any policies, contracts or agreements on behalf of or in the name of the company, or, to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the company, to incur any obligations or liability for which the company should be responsible.

6. If said receipt is construed to be a contract of insurance, it is not a valid contract under the laws of Iowa because the defendant was prohibited by the statutes of Iowa from issuing contracts of insurance in an amount more than $10,000 without a medical examination duly passed and approved by the medical examiner or the medical board of the company. Section 508.28 of the Code of Iowa, 1954, requires or contains this language: "The Commissioner of Insurance shall decline to approve any form of policy unless insurance is based upon the satisfactory medical examination of applicant by a physician, and no policy or contract shall be issued by any insurance company to any individual until such examination has been passed and duly approved by the medical examiner or the medical board of the company." And then in a subsequent section there is a provision that non-medical insurance may be issued up to $10,000.

7. It appears from the record that there was no medical examination because of failure of the proposed insured to have an

and for judgment n.o.v. Defendant contends that it is entitled to judgment for the reasons stated in the motions.

It appears to us that the vital question involved in this appeal is the construction to be given to the conditional receipt heretofore set out. The execution and delivery of the application, the payment of the premium, and the issuance of the receipt all occurred in Iowa. We agree with the parties that Iowa law controls.

One of the leading cases in the field of temporary life insurance is *Reynolds* v. *Northwestern Mutual Life Ins. Co.*, 189 Iowa 76, 176 N.W. 207. In that case the Iowa court had occasion to consider a conditional receipt very similar to the one now before us. There, as in our present case, the first premium had been paid. In the *Reynolds* case the condition was "provided the said company in its judgment shall be satisfied as to my insurability, on the plan applied for, on the date of such medical examination." Here, the material condition is, "provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is

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examination. Therefore, he failed to furnish an application upon which the defendant, under the law of Iowa, could insure his life for $10,500.

8. It appears from the evidence that the proposed insured was informed that a medical examination was necessary in connection with his application for life insurance. His failure to take said medical examination, as shown by the record, was not due to any act or neglect on the part of defendant, and there is no evidence that said medical examination was waived by the defendant.

9. It appears from the evidence that because of the proposed insured's aviation record, he was not insurable for the plan and rating applied for under the defendant's underwriting rules and practices. Regardless of whether the answer to Question 17 (a) in the application was written by the agent before or after the proposed insured signed the application, if he had answered "yes" to said question he was not insurable for the plan and rating applied for.

received at the Home Office of the Company in Boston." The Iowa court in *Reynolds* recognized that preliminary contracts of insurance are valid and enforceable. The court then states that the contract must be construed as a whole, and effect must be given to the condition relating to insurability. The court says (p. 209):

> "* * * The insurability of the applicant on the date of the medical examination is, by the contract made the test of the company's liability."

The court construes the contract as a whole as follows (p. 209):

> "* * * Unless the application is in the proper exercise of the company's rights, under the law and the contract, rejected, and the insurance refused, the preliminary contract provides protection from the date of the medical examination, and if death results from some cause arising after the date of such examination, the company is liable upon the contract, according to its terms; but if the company, in the proper exercise of its legal rights, under the law and the contract, which it is unnecessary for us to define in this opinion, rejects the application upon the ground that the applicant is not insurable and returns the premium paid, no liability can arise thereunder."

In the *Reynolds* case the applicant died before the completion of the investigation as to his health. The insurer, after applicant's death, rejected the application upon the ground that the applicant was not an insurable risk on the date of the medical examination. The Supreme Court of Iowa determined that the trial court had properly found as a matter of law that the insurer had in good faith rejected the application on the ground that the applicant was not insurable for the policy applied for, stating (p. 210):

"* * * The record, we think leaves no doubt that he was not entitled to insurance and that no liability existed upon the contract. The fact that the company did not, prior to his death, know that deceased had been for several months afflicted with heart trouble, should not be given controlling importance. It goes to the question of his insurability. * * *"

That the subject of temporary life insurance pending approval of application or issuance of policy has caused the courts considerable difficulty is demonstrated by an exhaustive note in 2 A.L.R. 2d 943. The wording of the binders or conditional receipts involved in the decided cases varies considerably. The author of the cited annotation, at p. 960, classifies the types of contracts of temporary insurance in general use as follows:

"(1) The first type of contract, around which most of the existing conflict centers, usually provides that any insurance shall, by reason of the payment of a premium at the time of the application, be in force from the date of the application (or of the medical examination), provided the application shall be approved and accepted, as applied for, at the home office of the insurance company.

"(2) Another type of receipt provides that the insurance shall be effective as of the date of the medical examination, if the company shall be satisfied that on that date the applicant was an insurable risk and that the application was otherwise acceptable under the company's regulations for the amount and plan of the policy applied for. In some instances the date of the application is taken instead of the date of the medical examination.

"(3) In a third type of receipt the provision is that the insurance shall be in force as of the date of the application or the medical examination if the company at its home office shall issue the policy on the

plan applied for. In some instances delivery of the policy is required.

"(4) The fourth type of receipt is represented by the unconditional provision that the insurance shall take effect as of the date of the approval of the application by the insurer."

The conditional receipt we are considering would appear to be of the class described in paragraph 2. The variance is that in our present case the effective date of the insurance is made the date of the receipt rather than the date of the medical examination. The annotator, at page 987, cites authorities upholding the validity of a condition of insurability, among them *Reynolds* v. *Northwestern Mutual Life Ins. Co., supra; Warren* v. *New York Life Ins. Co.*, 5 Cir., 128 F.2d 671; *Gonsoulin* v. *Equitable Life Assurance Society*, 152 La. 865, 94 So. 424; *Equitable Life Assurance Society* v. *Robertson*, Mo. App., 191 S.W. 989.

The application and conditional receipt in *Mofrad* v. *New York Life Ins. Co.*, 10 Cir., 206 F.2d 491, are of the same general type we are here considering. In that case a directed verdict for the insurer was affirmed upon the basis that the insurance was not in force because the applicant had not met the insurability test. The court upon the issue of construction states (pp. 493, 494):

"* * * 'A contract of insurance rests upon and is controlled by the same principles of law applicable to any other contract. What the contracting parties intended, mutually agreed to, and their minds met upon, is the measure of their obligations.' * * * And if the intentions of the parties are clear from an examination of the contractual documents, this court will not rewrite the contract. * * *"

"The application for the policy provided that the insurance policy should be dated as of the date of the

> application. 'It was within the rights of, and was competent for, the parties to provide in the application under what conditions and at what time the policy should become effective and binding.' *Jones* v. *New York Life Ins. Co.*, 1927, 69 Utah 172, 293 Pac. 200, 202. The provisions in the application agreement do not fix the effective date of the insurance contract. They simply impose conditions precedent to the taking effect of the insurance coverage. *Shira* v. *New York Life Ins. Co.*, 10 Cir., 1937, 90 F.2d 953. When read together, they mean that the insurance coverage shall take effect only in the event the conditions precedent specified in the application are fulfilled, and then only as of the date of the application. * * *"

As pointed out by Judge Clark in his concurring opinion in *Gaunt* v. *John Hancock Mutual Life Ins. Co.*, 2 Cir., 160 F.2d 599, 603, the insurability condition is much fairer to the insured than the approval condition. Under the approval condition absolute power remains in the insurer to reject the risk. Under the insurability condition the risk can be rejected only in the event a good faith determination is made of lack of insurability as of the time the temporary insurance was to become effective.

The effect of the words "Immediate Coverage" written into the receipt by the agent must be considered. Under the *Reynolds* case, *supra*, a receipt such as the one we are considering provides immediate coverage, subject to the provisos setting out the circumstances under which the insurance would not be in effect. Unless the words "Immediate Coverage" were intended to eliminate the conditions agreed upon, the addition of the words does not change the meaning of the contract. We observe that the receipt is labeled "CONDITIONAL RECEIPT" in large letters. The conditions are plainly stated in the receipt. The conditions were not eliminated from the receipt, nor were they expressly waived. The conditions remained a

part of the receipt as delivered. We do not believe that it can fairly be said that the addition of the words "Immediate Coverage" was intended to eliminate the conditions. Under such a construction of the contract as a whole, we do not reach the serious question of the authority of the agent, Bliss, to alter the receipt or to agree to immediate unconditional coverage.

From our consideration of the authorities heretofore cited, we believe that the Iowa court would not find the conditional receipt before us ambiguous, and would construe it as providing insurance from the date of the receipt, subject to the condition that if the insurer rejects the application in good faith for valid reasons upon the ground that the applicant is not insurable for the amount, rating, and plan applied for, and the premium is returned, no liability will exist even if death occurs before notice of rejection. The check given for the premium was never cashed. It was returned to the beneficiary and later sent to the defendant by plaintiff's attorney. The insurer has tendered its return.

Defendant contended in its motions in the trial and contends here that there could be no valid temporary insurance, relying upon language in the *Reynolds*, case, *supra*, relating to insurability upon the date of the medical examination. In the *Reynolds* and some of the other cases relied upon by defendant the conditional receipt called for insurability on the date of the medical examination. In our present case the receipt provides that the insurance applied for shall be in effect from this date (obviously meaning the date of the receipt), subject of course to the provisos. There is nothing in Part I of the application inconsistent with the receipt. The application provides that if the premium is paid with the application "the insurance shall take effect as stipulated in the Conditional Re-

ceipt." The conditional receipt on the basis of the words it contains can not fairly be construed to add the medical examination as an additional condition precedent. Whether by implication of law such a condition is to be read into such receipt because of section 508.28 of the Code of Iowa, 1954, prohibiting the issuance of a policy of life insurance for more than $10,000 until a satisfactory medical examination shall have been passed and approved by the medical examiner or medical board of a life insurance company, raises an unsettled question of Iowa law upon which we deem it unnecessary and, hence, inadvisable to express an opinion.

It was contemplated by the parties that the proposed insured submit to medical examination. By mutual agreement such examination was deferred until February 28, 1955. At the time of the application no one anticipated the proposed insured's untimely death. The fact dispute as to who requested the postponement of the medical examination has no bearing upon the result we reach.

The conditional receipt we are considering contains two provisos, the first pertaining to good health and the second to insurability. The trial court submitted the issue of the good health of the applicant at the time of the application to the jury, and in effect told the jury that if they found for the plaintiff on this issue, the verdict should be for her. The jury found for the plaintiff.

There is serious doubt whether the question of the sufficiency of the evidence to sustain the jury's verdict upon the good health issue is properly before us for review. Since we consider our determination upon the insurability issue, hereinafter discussed, decisive of this case, we shall assume without deciding that there was enough evidence to make the issue of good health, standing alone, one of

fact for the jury, and that the jury's finding that the applicant was in good health is binding upon us.

This leaves for consideration the condition as to insurability. The trial court took the position that good health and insurability are practically synonymous. In so doing the trial court erred. While there are some authorities to support such position, the weight of authority and the better rule are contrary. Good health is an element of insurability, but is only one of many elements to consider upon the issue of insurability. The authorities on the meaning of insurability are ably discussed in *Kirby* v. *Prudential Insurance Company of America*, Mo. App., 191 S.W.2d 379, 162 A.L.R. 660. The court concludes:

> "We cannot say that the term insurability is ambiguous and is susceptible of two different interpretations, one of which is 'good health.' It is not thought that the man on the street would so construe the term. Probably most people know that to be insurable one must have good health; but they also know that good health is not the only factor about which insurance companies are concerned in the issuance of policies. They know that insurability means more than good health."

In *Rosenbloom* v. *New York Life Ins. Co.*, W. D. Mo., 65 F.Supp. 692, Judge Ridge quotes with approval from the *Kirby* case and states (p. 696):

> "* * * From the opinion in the *Kirby* case, *supra*, and the authorities cited therein, it is manifest that the term 'insurability' is a term of art when used in conjunction with life insurance. 'Insurability' as a term of art signifies all those physical and moral factors reasonably taken into consideration by life insurance companies in determining coverage or matters affecting the risk."

In reversing the *Rosenbloom* case on other grounds this court said (163 F.2d 1, at p. 4):

> "* * * For the purposes of this opinion, we assume that 'insurability' may include elements other than health—such as vocation. * * *"

In *Kallman* v. *Equitable Life Assurance Society,* 248 App. Div. 146, 288 N.Y.S. 1032, the court speaks as follows:

> "* * * The distinction between 'good health' and 'insurability' might be illustrated in the case of a criminal condemned to death. On the eve of his execution he might be found to be in perfect physical condition, but it could not be reasonably contended that his situation did not affect his insurability. There are numerous circumstances which affect insurability. * * *"

In *Warren* v. *New York Life Ins. Co., supra,* the premium had been paid, and the insurability proviso was similar to that in the present case. Applicant had made negative answers to aviation questions. From investigation the insurer learned of applicant's flying, suspended the application, and requested applicant to fill out an aviation form. The applicant died in an automobile accident before this was done. Recovery was denied upon the basis that no insurance was in force. The insurability proviso is not discussed. However, in the District Court opinion, 37 F.Supp. 358, 362, in considering the materiality of false representations as to insurance, the court states, "The risk caused by participation in aeronautics is a serious one." In *Kirby* v. *Prudential Insurance Company of America, supra,* the court approved the finding of the trial judge against an applicant for reinstatement on the basis that the applicant was engaged in aeronautics and that such activities substantially increased the risk, stating that the trial court could not properly have found otherwise.

We find the reasoning of the cases holding "insurability" is broader than "good health" to be sound and convincing. For the purposes of our present case it is not necessary to determine just how broad the scope of the term "insurability" is. We are satisfied that an insurer is justified in taking into consideration a hazardous activity, such as flying, in determining insurability.

The undisputed evidence shows that the proposed insured had held a pilot's license since 1946, and that he had owned an interest in a plane continuously since 1951. He flew every Sunday when the weather permitted, and his 1954 license showed he reported 1450 hours of flying time. The evidence likewise establishes that the insurer uniformly declined to accept at standard rates risks of applicants engaged in flying. The company's policy in the case of applicants engaged in aviation was to require the applicant to fill out an aviation questionnaire which, among other things, asked the applicant whether, in the event the policy could not be delivered at standard rates, he desired a policy at standard rates with an aviation exclusion, or full coverage at extra premium. The extra premium for aviation coverage was $3.75 per thousand per year, which would have increased the premium on the policy applied for nearly 50 per cent.

The questions on the application pertaining to aviation were answered by applicant in the negative. The application contains a certification that the information appearing on the application is correctly recorded. Hinkle signed the application. Bliss testified that aviation questions were asked and the answers properly recorded. We have serious doubt whether there is any substantial evidence to the contrary. Mrs. Hansen, a fellow employee of applicant, who had testified in the case in chief, was recalled in rebuttal,

and testified that she was within a few feet of applicant's desk at the time the application was filled out. She said she didn't pay much attention to the conversation, but that she knew Mr. Hinkle flew frequently and to the best of her recollection she did not hear any mention of aviation.

In the briefs of the respective parties, each is seeking to blame the other for the false answers to the aviation questions, and to assert rights based upon such contentions. The trial court in its instructions to the jury said:

> "Now, ladies and gentlemen of the jury, my viewpoint is such of this case that it is wholly unimportant whether Mrs. Hansen heard part or all, or anything of that sort, because here is a contract that says if he were in good health at the time then there was temporary insurance that would pay his beneficiary the amount of the insurance. If he were not in good health then he is not entitled to recover regardless, because this conditional receipt only refers to an application. It makes no difference what was said in that application in my judgment. * * *"

Neither side excepted to the instructions given, or requested instructions on the theories they are now advancing. We do not believe that the question of who was responsible for the false answers as to aviation on the application is of any importance on this appeal. The defendant was not limited to information contained in the application in passing upon the question of insurability. The defendant had before it the information as to aviation before it acted on the application.

It is apparent that the application for insurance was for insurance at standard rates. The premium was paid upon the basis of standard rates. No information was disclosed by the applicant to the effect that he was engaged in

flying. The evidence conclusively shows that the proposed insured, because of his aviation activities, was not insurable for the amount, plan and rating applied for, and that the defendant made a good faith determination that he was not so insurable. The fact that Hinkle might have been able to obtain insurance at a higher rate is of no help to the plaintiff as such was not the coverage applied for.

Defendant in its pleadings asserts that if temporary insurance existed it was conditional, and that the insurance never became effective because the condition as to insurability was not met. This issue is also raised in the motions for a directed verdict and for judgment n.o.v. Plaintiff complains that the defendant did not fully investigate applicant's insurability. Sufficient information of applicant's aviation activities, evidence as to which was introduced at the trial, came to the defendant to warrant it in good faith to determine that the applicant was not an insurable risk for the plan applied for. The applicant died in an airplane crash the day following the application and before the application could have reached the home office. There was no time for investigation prior to the applicant's death. Any delay in the investigation under such circumstances was in no way prejudicial to plaintiff.

The defendant was legally entitled to have its motion for directed verdict sustained upon the basis that the insurance was not in effect at the time of the applicant's death, for the reason that the applicant did not, and could not, meet the insurability condition set out in the conditional receipt because of his aviation pursuits.

Other issues argued by the parties have been considered, but do not warrant discussion for the reason that what has heretofore been said compels a reversal.

The judgment appealed from is reversed, and this case is remanded with directions to enter judgment for defendant.

WOODBROUGH, Circuit Judge (Dissenting).

The controversy here grows out of a well known kind of transaction between the insurance company and a so-called "proposed insured" that is soundly helpful to the business of selling life insurance, but has been unhappily considered in such a way as to bring discredit on the companies and grief and suffering on certain unfortunate widows and orphaned children.

In the life insurance business it takes a little time for the companies to check on insurability of prospects and sometimes to adjust clerical or other incidental details and that little delay hampers the selling of life insurance on which the existence of the companies is dependent. To meet that condition, the insurance agents are supplied with the printed form such as was used in this case, headed in bold type "Conditional Receipt", the terms of which enable the agents to assure a prospective purchaser of life insurance that he will not be affected by that unavoidable little delay, but that if he is in good health, he will have (in this case) $10,500.00 insurance on his life in full force and effect from the day he delivers the amount of the first premium to the agent. The conditional receipt bears conspicuously the name of the company (in this case, New England Mutual Life Insurance Company) and the signature and counter signature of company officers; to-wit: General Agent and Secretary, and distinguishing between the time after the necessary delay when a proper policy is conditionally to be issued, and the time of the transaction, the General Agent inserts the date of the transaction

conspicuously in writing in the blank for that purpose so that the instrument reads, "Insurance applied for shall be in full force and effect from this date provided the proposed insured is now in good health"—(in this case the date of payment, February 25, 1955, was written in with a pen,) "2/25/1955" and the printing included "this day" (twice repeated) "this date" and "now"; all being used in the instrument to stress that the transaction relates to the undertaking of a present obligation by the company and not to the policy of life insurance that is to be issued later, only on certain conditions.

Laymen who are solicited in this transaction understand perfectly that when they pay the money and get the receipt, they have the company's obligation to pay if they die before the final closing of their insurance deal. In this case when the "proposed insured" left his home to go to his death the next day, after he made his payment to the agent, he left the "Conditional Receipt" the company gave him where his wife would find it and know he thought of her and believed he had provided for her.

The transaction with the company's agent that caused that belief was an entirely fair one and involved no discrimination in favor of the receipt holder and no unfair burden on the company.

In the first place if the proposed insured lied when he said he was in good health, there was no liability on the company. The first and only condition precedent to the obligation the company declared in its receipt, namely, that the insurance was immediately effective, was as above stated, that the "proposed insured is now in good health."

The other condition in the receipt was a condition subsequent to the company's obligation declared in the receipt to the effect that if, after its date, satisfactory evidence of

the proposed insured's insurability was not received at the company's home office in Boston or if the company determined he was not insurable, it would decline his application for a policy.

This condition of the receipt is not incompatible or in conflict with the company's obligation for "insurance in full force from this date." The two accord fully with each other. The words of the receipt make it perfectly plain that the company would not ultimately issue an insurance policy unless the company became satisfied of insurability. But that had nothing to do with the willingness of the company to make and fulfill the obligation concerning "insurance in effect from this date" declared in the receipt.

When Mr. Hinkle died, the day after the receipt had been delivered to him and his money had been accepted, all of the conditions upon the company's obligation to pay the amount of $10,500.00 specified in the receipt had become satisfied and the company should pay. The situation then was simply that the company had agreed that if Mr. Hinkle died the money would be paid and if he survived, the matter would go forward to the issuance of a policy or denial of it. After his death there was no point or sense in going on with any inquiry about his eligibility for a life insurance policy of any particular kind or about any other detail that might have come up if he had not died and if the transaction had been proceeded with.

There is no element of harshness or unfairness to the company or discrimination towards its patrons in the transaction with the receipt. The terms of the receipt protect the company and forestall such a consequence. The receipt specifies that on determining non-liability, the company will refund the payment made to it by the pro-

posed insured, but it does not state in express words what is to be done with the money paid on the happening of death while the "insurance is in full force from this date" before such company determination. Neither does it state what is to be done with the money if the policy issues. Manifestly the death obviated making the determination as to insurability so that the payment in the hands of the company has to be applied in accord with the necessary implication of the transaction in which it was paid and received.

The recital of the receipt is that the payment was "in connection with the application for insurance of $10,500.00 on the life of W. Max Hinkle" so that the company's right to apply it on the temporary coverage is complete and exactly as clear as its right to apply it on the first premium of a policy would have been if such policy had issued. So far as applying the payment is concerned, the same words cover both situations.

The payment manifestly was amply sufficient to fully compensate the company for the risk it took under its obligation for insurance in full force and effect from "this date". That is practically demonstrated by the fact that insurance for short term is daily and hourly sold throughout the country through vending machines that deliver a policy for $10,000.00 to anybody and everybody who deposits a fifty-cent coin in the slot. The record shows that the insurance herein was to cost $20.70 a quarter or $82.80 per year of 365 days or 22¢ a day.

In the transaction herein involved it is true the company stood to absolutely lose that 22¢ a day if Mr Hinkle lived and his application was declined. In that event it was obligated to refund the entire $20.70. But the part of that refund the company would lose if the company had

to make it probably would not equal the cost of the time of the agent soliciting or of an advertising calendar or gadget also risked to obtain a new policy holder who might well be expected to bring in hundreds or even thousands of dollars of premiums.

It might be only "petty stuff" to give a short year's insurance for a full year's premium, but it is such a serious wrong for a company to make a man believe it has insured him and to take his money therefor, if it does not so intend and I see no reason to ascribe such a thing to the company in this case.

I am not convinced that the few Iowa cases cited prohibit sustaining the judgment for the widow in this case. I would affirm the judgment.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that New England Mutual Life Insurance Company of Boston, Massachusetts, have and recover against Maxine K. Hinkle, Administratix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, the sum of Three Hundred Eighty-one and 15/100

($381.15) Dollars for its costs in this behalf expended and have execution therefor.

And it is further Ordered by this Court that this cause, be, and the same is hereby remanded to the said District Court with directions to enter judgment for defendant.

November 5th, 1957.

Petition for Rehearing Denied, Dec. 6, 1957.

TURN TO

NEXT CARD

Office - Supreme Court, U.S.
FILED
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JOHN T. FLY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 28

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Des Moines, Iowa,
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RALPH A. CHURCH,
LUTHER L. HILL, JR.,
Of Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 714.

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

RESISTANCE OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petition in the case at bar obviously fails to comply with Rule 23 of the Rules of this Court. The "statement of the case" is a mere statement of some of the facts. It is inaccurate and misleading and fails to advise the Court about the specific issues and how they were decided. Throughout the petition there are constant misstatements

of the record that are very misleading. We feel constrained to make a restatement of the case.

(1) The nature of the action.

This is an action at law on an alleged contract for temporary life insurance based upon a conditional receipt given to W. Max Hinkle, the proposed insured, for the payment of a first premium in connection with an application for a life insurance policy. It was removed from the District Court of Polk County, Iowa, to the United States District Court for the Southern District of Iowa on the ground of diversity of citizenship between the parties.

A photostatic copy of the receipt is in the Record (p. 17), and the original receipt has been certified to this court.

The proposed insured was killed in an aeroplane accident the day after the receipt was given and before he had taken the medical examination required.

(2) The claim upon which the action is based.

The original petition, as it is denominated under Iowa practice, was in four counts. In the first two counts, the plaintiff sued as administratrix of the proposed insured's estate, in Counts III and IV she sued in her individual capacity as beneficiary named in the application for the policy. Counts I, II and III were withdrawn from the jury, so that the only Count left in the case at the time of its submission to the jury was Count IV.

In preparing the petition, opposing counsel chose to repeat the allegations of Counts I and II in Count IV by reference only, so that it is necessary to read Counts I and II to find the substantive allegations of Count IV.

Count I (R. 2) is based on the claim that the conditional receipt in itself was a contract of temporary insurance

effective immediately and that by reason of the death of W. Max Hinkle on February 26, 1955, the plaintiff as his administratrix is entitled to $10,500.00.

Count II (R. 4) repeats Count I and further alleges that the medical examination of the proposed insured was excused by his death before the time set by him and the defendant for said medical examination or it was waived by the defendant.

Count IV (R. 6) adopts by reference these two claims made by the plaintiff in her representative capacity as administratrix of the proposed insured's estate and alleges that she is entitled to recover as "the named beneficiary of the insurance."

(3) The defenses made to the claim.

The defenses to Count IV were as follows:

(1) That the conditional receipt was not a contract of temporary insurance, but a mere receipt delivered in connection with an application for life insurance, which was never completed by the proposed insured because he failed to take the medical examination required as a part thereof. (R. 8 and 9)

(2) That said receipt was conditioned upon the receipt of satisfactory evidence at the home office of the defendant in Boston that the proposed insured was insurable for the amount, plan and rating applied for; that because of the failure of the proposed insured to take a medical examination, no such satisfactory evidence has ever been received by the defendant at its Home Office in Boston and the insurance applied for never went into effect. (R. 9)

(3) That if the receipt is construed, because of the insertion in the receipt of the words "Immediate Coverage",

to be an agreement on the part of the defendant's agent that the insurance applied for would take effect immediately upon delivery of the receipt, said agreement was not authorized by the defendant and was not binding upon it. (R. 10)

(4) That the proposed insured was not insurable for the amount, plan and rating applied for on account of his aviation record, and could not furnish satisfactory evidence that he was so insurable, and therefore the insurance applied for never went into effect. (R. 11-12)

(5) That the defendant was prohibited under the laws of Iowa from issuing a policy of life insurance in the amount of $10,500 without a medical examination and the proposed insured knew that a medical examination was required, and because of the failure to take said medical examination, no complete application was ever made pursuant to which a valid policy or contract for $10,500 of life insurance could be issued under the Iowa statute. (R. 12)

(4) The issues actually tried and how they were decided.

Under the instructions of the court only one issue was actually tried, namely, whether the proposed insured was in good health on the date of the receipt. At the close of the evidence the defendant made a motion for a directed verdict in its favor (R. 55) which was overruled and the court then instructed the jury that there was only one issue in the case, namely, whether the proposed insured was in good health on the date of the receipt; that if he was in good health, the conditional receipt created a contract of temporary insurance which remained in force until the defendant acted upon the application, and although defendant had not acted on the application, the contract of temporary insurance was in force on the date following the applica-

tion, when the proposed insured was killed. (R. 63) Counts I, II and III were withdrawn from the jury. (R. 54)

On this issue the jury returned a verdict for the plaintiff Maxine K. Hinkle, in her individual capacity as beneficiary named in the application, for $10,500, the full amount of the insurance applied for and judgment was entered thereon. (R. 70-71)

(5) The facts disclosed by the evidence.

Rodney Bliss, Jr., had been the general agent of the defendant in Des Moines, Iowa, for eight years. His contract with the defendant was introduced in evidence as Exhibit B (R. 36) and in Section 2 thereof he is expressly forbidden to make, alter or discharge any policies, contracts or agreements on behalf of, or in the name of the Company, or to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the Company, to incur any obligations or liability for which the Company shall be responsible.

Bliss did not know W. Max Hinkle, the proposed insured, but heard that he had a mortgage on his home and was employed by G. W. Onthank Company of Des Moines. One of the policies issued by the defendant is a decreasing term policy as described in its pamphlet Exhibit C. (R. 38, 36) It provides convertible decreasing term insurance for a period of 10, 15 or 20 years. The initial death benefit is $1,050 per unit, and the minimum amount issued is ten units, $10,500 initial risk. On the 20 year plan, the death benefit for ten units would be $10,500 in the first year as shown by the table in Exhibit C (R. 39) and would decrease $500 per year. If premiums were payable quarterly the first quarterly premium at age 42, Hinkle's age, would be $21.70. (R. 39)

Bliss called on Hinkle at the office of the Onthank Company on February 25, 1955, after a telephone conversation in which he had explained briefly to Hinkle the coverage of a decreasing term policy. He obtained Part I of an application for ten units with an initial death benefit of $10,500. Hinkle signed Part I of the application (Exhibit D, R. 19, 36) which was filled out to cover all the information Bliss had to obtain from Hinkle. The original application has been certified to this court. Hinkle gave Bliss a check payable to the New England Mutual Life Insurance Company for $21.70, the first quarterly premium (Exhibit E, R. 40, 36). This check was never deposited in the bank. It was held by Bliss pending an investigation by a Des Moines law firm purporting to represent Mrs. Hinkle, then returned to her on May 19, 1955. (Exhibit G, R. 41, 36) It was subsequently returned to Bliss by her attorney of record in this action and was tendered to her by the answer in this case. (R. 10)

When the premium was paid Bliss detached from the application the conditional receipt at the bottom of the application form. (R. 34) This receipt was a printed form. It contained blanks for filling in the amount of the payment, the amount of the insurance applied for, the name of the proposed insured, the date and the signature of the agent. Said receipt was introduced in evidence as Exhibit 1. (R. 17,29) Bliss filled in the amount paid "Twenty one and 70/100"; the amount applied for, "$10,500.00", the name of the proposed insured (W. Max Hinkle), the date and his own signature and wrote under the figures "$10,500.00" the words "Immediate Coverage". He testified that he explained to Hinkle that this was meant to give the amount of the initial death benefit. Without some such qualification the receipt would indicate that the insurance would always be in the face amount of $10,500 whereas under this policy the amount was reduced $500 every year. It

was explained to Hinkle that as the mortgage on his home was gradually reduced by partial payments, the amount of insurance would also be gradually reduced. (R. 35, 32-33)

Part I of the application was not completed at the time with the form and amount of insurance because that had been orally agreed upon, but Bliss testified that he asked Hinkle all the questions to which answers appear on the application and wrote them down in Hinkle's presence before Hinkle signed the application. He said that Hinkle answered "no" to the aviation question 17-a "Does the proposed insured plan to make flights as a trainee, pilot or crew member or has he made such flights within 10 years?" (R. 33) Mrs. Hansen, a clerk in the same office, said that she did not hear Bliss ask Hinkle this question but she was busy at her own work and paid no particular attention to the conversation until Bliss picked up the telephone to call Dr. Posner. (R. 29-30) She and Robert Evans who was in and out of the office while Bliss was there testified that it was common knowledge at the office that Hinkle had been flying as a pilot for years. (R. 52-53) Bliss testified that he knew nothing whatever about Hinkle's aviation activities. (R. 34)

After the application had been signed and the receipt delivered Bliss asked Hinkle when he could take the medical examination and Hinkle said "today". Bliss then telephoned Dr. E. R. Posner, the medical examiner of the company at Des Moines, for an appointment. (R. 34) There is some conflict in the evidence as to the exact time the conversation took place. Mrs. Hansen, the clerk referred to, testified it was after lunch. Bliss said it was between 11 and 11:30 A. M. Bliss testified that he made an appointment with Dr. Posner for Hinkle at 11:45 that morning, that just as he was hanging up the phone Hinkle told him he was too busy and the appointment was made for 11:30 the fol-

lowing Monday. (R. 34) This was verified by Dr. Posner in his testimony. (R. 31) Mrs. Hansen, who was in Hinkle's office, testified that she heard Bliss tell Hinkle that the doctor could not see him that day and that the appointment was then made for Monday morning. (R. 29)

Hinkle was killed while flying his plane which crashed near Des Moines the following day, Saturday.

The plaintiff, Mrs. Hinkle, testified that when she got up that Saturday morning her husband had gone and she found the conditional receipt on the kitchen table. Hinkle had planned to fly to Omaha that morning. (R. 29)

Under the underwriting rules and practices of the defendant, if a proposed insured was a pilot, he was asked to fill out an Aviation Questionnaire (R. 47) and the application Exhibit D, states at the bottom of its aviation section No. 17, after the questions with regard to aviation: "If answer to A, B or C is yes, complete Aviation Questionnaire". (R. 19) The aviation questionnaire in use by the defendant was introduced in evidence as Exhibit H. (R. 42, 36) It states at the top that it must be submitted if the proposed insured plans to make flights as a trainee, pilot or crew member or has made such flights within ten years. It contains a detailed list of questions showing the flying record, license, ownership of aircraft, etc. It contains the following instruction at the bottom:

> "Notice to Agent: If insurance with aviation coverage cannot be issued at standard rates, is
>
> ( ) full coverage with extra premium, or
>
> ( ) standard rate with aviation exclusion desired?"

In case of a pilot, if the proposed insured desired a full coverage with extra premium, he would be required to pay $3.75 extra premium for each $1,000 of insurance.

(R. 47) If he desired the standard rate with aviation exclusion, he was required to sign an amendment limiting aviation coverage. The form of amendment was introduced in evidence as Exhibit I. (R. 44, 36) It provides in substance that if the death of the insured results from travel or flight or descent from or with any kind of aircraft of which the insured is acting as a pilot, the liability of the Company under the policy shall be limited to the premiums paid, less dividends, or the reserve whichever is greater. There is a place at the bottom for the signature of the proposed insured, to be witnessed by the agent.

Hinkle's aviation record was stipulated and shows that he had had a pilot's license from the Civil Aeronautics Administration since November, 1946, that he owned four aeroplanes in partnership with others; that he piloted a plane from the municipal airport in Des Moines every Sunday when weather permitted, that when he applied for a pilot's license in December, 1954, he reported total flying time of 1,450 hours as a pilot, 43 of which occurred during the last six months of 1954. (R. 49-50)

Under the underwriting rules and practices of the appellant, if this record had been disclosed in the aviation questionnaire, Hinkle would have been given his choice to pay an extra premium for full coverage or to have the amendment limiting coverage attached to his policy. He was not insurable on the plan and for the rating applied for. If he had taken the medical examination, a report would have been obtained from the Retail Credit Company, which would have covered his aviation record and the policy would not have been issued as applied for. (R. 47)

The only evidence as to the good health of the proposed insured was that he passed an examination for a

pilot's license on December, 1954. (R. 50) There was no evidence as to the qualifications for such a license, and no medical and no lay testimony as to the proposed insured's state of health on February 25, 1955.

Part I of the application, Exhibit D, was never forwarded to the home office of the defendant. (R. 47)

After Hinkle's death Bliss told the plaintiff that the defendant would not pay her because there had been no physical examination. (R. 29)

A subsequent investigation was made by a firm of lawyers in Des Moines on behalf of Mrs. Hinkle and Bliss sent them the application. (R. 40) It was subsequently returned to Bliss and the check was returned to Mrs. Hinkle. (R. 41) Another lawyer was later retained and this suit was commenced.

We do not want to abuse the patience of the Court by going through the petition and pointing out each misstatement of the record. We do, however, want to call the Court's attention to two important misstatements. The petition refers again and again to what opposing counsel seems to consider an estoppel from asserting that the receipt did not constitute a temporary contract of insurance, and he says: "Plaintiff did plead estoppel here." There is no mention of estoppel in the petition. The plaintiff filed a reply in which estoppel is pleaded four times. The first is in Division III (R. 22), where the plaintiff claimed that the defendant was estopped from pleading the agent's lack of authority to bind the company by a contract of temporary insurance. This question was not considered by the Court of Appeals in view of its holding as to insurability as stated in its opinion. The second plea of estoppel is in Division IV (R. 23) where the plaintiff alleges that the defendant is estopped under Section 511.34 of the Iowa Code from proving

the application for the policy because no copy was given to the applicant. The Iowa statute relates only to actions on a policy when issued and as no policy was issued here the statute does not apply. The third plea in Division V (R. 24-27) is that the defendant is estopped from pleading that the alleged contract of insurance was invalid under Sec. 508.28 of the Iowa Code prohibiting a life insurance company from issuing a policy in excess of $10,000 without a medical examination. The Court of Appeals held that the defense under this statute raised an unsettled question of Iowa law upon whether it was deemed unnecessary and hence inadvisable to express an opinion. The fourth plea is in Division VI (R. 27) which is a repetition of the second plea referred to above. We can find no pleading asserting that the defendant was estopped from asserting the invalidity of the receipt as a contract of temporary insurance because the proposed insured was not insurable for the plan and rating applied for. In this state of the record, the argument of counsel as to "mending his hold" and the Iowa cases purporting to deal with estoppel give no ground for granting the writ.

The other important misstatement is that the vice president of the defendant "testified that Hinkle was insurable for every plan they had and for any amount they had." The actual testimony is as follows:

"If Mr. Hinkle's aviation record had been disclosed in the aviation questionnaire a policy would not have been issued without any extra rating or without the limited aviation coverage." (R. 47)

"If a man owns an aeroplane and answers the questions regarding aviation in Exhibit D in the affirmative, he would be *eligible* for every plan of insurance we have with either an aviation exclusion rider or it would cost him a little more money." (R. 48) (Emphasis ours)

(6) Decision of the Court of Appeals.

The Court of Appeals applied the Iowa law on the question of conditional receipts given in connection with applications for life insurance as laid down in the case of *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N. W. 207, the only Iowa case on the subject. The substance of the opinion in this case is that because the proposed insured was not insurable for the plan and rating applied for as required by the receipt on account of his aviation activities, no contract of temporary insurance ever went into effect. Therefore, the Court held that the defendant was entitled to have its motion for directed verdict sustained.

In view of its decision on this question the Court said that the other issues argued by the parties and also raised by the motion for directed verdict had been considered but did not warrant discussion for the reason that its holding on insurability compelled a reversal. We submit that the defendant was entitled to a directed verdict on the other grounds stated in its motion.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

A writ of certiorari should not be granted for the following reasons:

1. This is a suit involving the construction of the specific language of a private contract removed to the federal court because of diversity of citizenship and is not of public importance.

Layne & Bowler Corp. v. *Western Well Works*, 261 U. S. 387, 67 L. ed. 712.

Rice v. *Sioux City Cemetery*, 349 U. S. 70, 99 L. ed. 897.

Magnum Import Co. v. *Coty*, 262 U. S. 159, 67 L. ed. 922.

Hamilton Brown Shoe Co. v. *Wolf Bros.*, 240 U. S. 251, 60 L. ed. 629.

2. This is a suit on an Iowa contract and the Court of Appeals correctly followed the Iowa law as laid down in *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N. W. 207, and its determination of the Iowa law should be accepted by this court.

Reynolds v. *Northwestern Mutual*, 189 Iowa 76, 176 N. W. 207.

King v. *United Commercial Travelers*, 333 U. S. 153, 92 L. ed. 668.

Meredith v. *Winter Haven*, 320 U. S. 228, 88 L. ed. 9.

Ragan v. *Merchants Transfer & Warehouse Co.* 337 U. S. 530, 93 L. ed. 1520.

Helvering v. *Stuart*, 317 U. S. 154, 87 L. ed. 154.

Spiegel's Estate v. *Commissioner*, 335 U. S. 701, 93 L. ed. 330.

Mutual Life v. *Johnson*, 293 U.S. 335, 79 L. ed. 398.

3. The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals on the same matter.

Liberty National Life v. *Hamilton*, (6th Cir.) 237 F. 2d 235.

Gaunt v. *John Hancock Mutual*, (2nd Cir.) 165 F. 2d 599.

Ruhlin v. *New York Life*, 304 U. S. 202, 82 L. ed. 1290.

New York Life v. *Jackson*, 304 U. S. 261, 82 L. ed. 1329.

Rosenthal v. *New York Life*, 304 U. S. 263, 82 L. ed. 1330.

Lyon v. *Mutual Benefit*, 305 U. S. 484, 83 L. ed. 303.

Mofrad v. *New York Life*, (10th Cir.) 206 F. 2d 491.

Warren v. *New York Life*, (5th Cir.) 128 F. 2d 671.

Bellak v. *United Home Life*, 211 F. 2d 280.

4. No federal constitutional question is involved.

5. No question of federal jurisdiction is properly before this court.

Louisville C. & R. Co. v. *Letson*, 43 U. S. (2 How.) 497, 11 L. ed. 353.

ARGUMENT.

I.

Not a case of public importance.

Rule 19 of the Rules of this Court provides that a review on writ of certiorari is a matter of sound judicial discretion and will be granted only where there are special and important reasons therefor. This is a diversity case and while it is of importance to the parties it is not of importance to the public. It is a suit on a conditional receipt given for the payment of a first premium in connection with an application for a life insurance policy, and governed by the law of Iowa. Every suit brought on such a receipt has to be determined by construing the exact language used. No question of general insurance law of importance to the public at large is involved.

Such a case is not one calling for the granting of a writ of certiorari under the statute or under the rules of this Court. In *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 67 L. ed. 712, a patent case, in dismissing a writ of certiorari as improvidently granted, this Court, speaking by Chief Justice Taft, said:

> "* * * it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

This language was cited with approval in *Rice* v. *Sioux City Cemetery*, (1955) 349 U. S. 70, 99 L. ed. 897.

Again in *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 67 L. ed. 922, the Court, speaking by Chief Justice Taft, said:

> "The jurisdiction to bring up cases by certiorari from Circuit Courts of Appeals was given for two purposes: first, to secure uniformity of decisions between those Courts in the nine circuits; and second, to bring up cases involving questions of importance which is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

In *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 60 L. ed. 629, the Court, speaking of the exercise of its jurisdiction to review judgments and decrees by certiorari, said:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decisions." (Citing cases.)

The contentions advanced by the petitioner here with respect to the construction of the receipt were advanced and urged in the Court of Appeals, which Court decided

such questions adversely to the petitioner. The petitioner seeks a writ in order to procure a rehearing of private questions, of importance only to the parties, the granting of which would be contrary to the settled rules and decisions of this Court.

II.

The Iowa law governs this case and it was determined by the Court of Appeals under the Iowa law.

We cannot understand the repeated assertions of opposing counsel under Part I of "Questions Presented" in the petition that the Court of Appeals violated the rule in *Erie Railway* v. *Tompkins* by refusing to follow the Iowa law. This was an Iowa contract and of course the Iowa law was binding on the federal court. The Iowa law was laid down in *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N. W. 207, which involved a receipt for a first premium conditioned upon the insurability of the applicant. The Iowa court said:

> "The insurability of the applicant on the date of the medical examination is by the contract made the test of the company's liability."

The applicant in the Reynolds case had a medical examination and was found by the medical examiner to be insurable but information obtained after his death showed that he was not. Therefore the Court held there was no liability under the receipt and the Company was entitled to a directed verdict. This is the only Iowa case on the subject and it is stronger in favor of the plaintiff than the case at bar because there was an actual medical examination which was satisfactory. The other Iowa cases cited in the petition do not involve receipts for first premiums. The Reynolds case is in line with the weight of authority in this country as pointed out by the writer of the ex-

haustive note on temporary life insurance in 2 A. L. R. 2d 943, on page 987.

On page 3 of the petition opposing counsel purports to state the law of Iowa as laid down in the Reynolds case and another Iowa case in quotation marks. The two quotations are followed by the titles of the cases. Anyone reading these quotations would certainly think they were quotations from the cases cited. However, they are not quotations at all and no such language can be found in the opinions. They only represent counsel's contention as to what the Iowa law is and they are not correct statements of the Iowa law as laid down in the two opinions.

The Court of Appeals did not determine the Iowa law on the authority of the agent to make a temporary contract of insurance in view of its determination of the Iowa law relating to the conditional receipt, but merely referred to it as a "serious question". There is therefore no error in the Court's opinion as to the authority of the agent under the Iowa law, as this question was not decided.

Counsel complains that the Court of Appeals erred in holding that good health and insurability were synonymous. There is no Iowa case on this point and although counsel asserts that there is a "split of authority" he cites no case contrary to those cited by the Court of Appeals. It is clear that in the absence of an Iowa decision the court had a right to determine the general law on the subject as held by the Court in *King* v. *United Commercial Travelers*, 333 U. S. 153, 92 L. ed. 608, and many other cases.

And as pointed out by Justice Stone in *Meredith* v. *Winter Haven*, 320 U. S. 228, 88 L. ed. 9, if the highest court of the state had not answered a question of state law and the character of the answers which the highest state courts might ultimately give remained uncertain, the federal courts would not hesitate to decide them in diversity cases.

It seems to us that opposing counsel has taken two absolutely inconsistent positions. In one breath he says that the Court of Appeals violated the Erie Railway case because it did not follow Iowa law. In the next breath he says that the federal courts should adopt a uniform rule with respect to conditional receipts. Obviously this is impossible for two reasons. The receipts used by the various companies are not uniform and the federal courts in determining the law of the various states could not adopt a uniform rule when the decisions of the various states are not uniform. The only way to achieve uniformity (assuming uniformity in the receipts) would be to overrule the Erie case and adopt a federal rule regardless of state decisions.

On the issue decided by the Court of Appeals the Court did determine what the Iowa law was, and followed it and it is not a function of the writ of certiorari merely to give the defeated party another hearing on the correctness of that determination. As stated by Mr. Justice Douglas in *Ragan* v. *Merchants Transfer & Warehouse Company*, 337 U. S. 530, 93 L. ed. 1520, in referring to a holding of the Court of Appeals for the Tenth Circuit with respect to the law of Kansas:

> "It is argued that the Kansas Statute in question is not an integral part of the Kansas statute of limitations. But the Court of Appeals on a careful canvass of Kansas law in an opinion written by Judge Huxman, a distinguished member of the Kansas bar, has held to the contrary. *We ordinarily accept the determination of local law by the Court of Appeals* (see Huddleston v. Dwyer, 322 U. S. 232, 237, 88 L. ed. 1246, 1249, 64 S. Ct. 1015), and we will not disturb it here." (Emphasis ours).

At the same term Mr. Justice Reed in *Helvering* v. *Stuart*, 317 U. S. 154, 87 L. ed. 154, speaking of the decision

of a Court of Appeals construing a trust under the law of Illinois said:

> "This conclusion does not spring from a statute of that state nor even from a clear or satisfying line of decisions. It is, however, the reasoned judgment of the circuit which includes Illinois in which a judge of long experience in the jurisprudence of that state participated. Without a definite conviction of error in the conclusion, this Court will not reverse that judgment."

And in *Spiegel's Estate* v. *Commissioner*, 335 U. S. 701, 93 L. ed. 330, which also involved the construction of a trust under Illinois law, Mr. Justice Black said:

> "The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals holding was wrong. It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die the trust corpus should revert to the donor. It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

To paraphrase the above opinions, it might well be said with respect to this case that the opinion of the Court of Appeals was written by Judge Van Oosterhout, a distinguished member of the Iowa bar with long experience in the jurisprudence of that state, after a careful considera-

tion of the law of Iowa and that his determination of the Iowa law should be accepted by this Court.

Although the case was decided before Erie Railway, we call the Court's attention to *Mutual Life* v. *Johnson,* 293 U. S. 335, 79 L. ed. 398. The suit involved a life insurance policy with disability benefits and the question was whether the insanity of the insured excused him from filing proof of disability. The contract was a Virginia contract and the question had been decided in favor of the insured by the Supreme Court of Virginia. Mr. Justice Cardozo speaking for a unanimous court said:

> "In this situation we are not under a duty to make a choice for ourselves between alternative constructions as if the courts of the place of the contract were silent or uncertain. Without suggesting an independent preference either one way or the other, we yield to the judges of Virginia expounding a Virginia policy and adjudging its effect. The case will not be complicated by a consideration of our power to pursue some other course. The *summum jus* of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance. No question as to a rule of the law merchant is present in this case. Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865. No question is here as to any general principle of the law of contracts of insurance (Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 511, 10 L. ed. 1044; 1051; Aetna L. Ins. Co. v. Moore, 231 U. S. 543, 559, 58 L. ed. 356, 366, 34 S. Ct. 186), with consequences broader than those involved in the construction of a highly specialized condition. All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and

to that one. With choice so 'balanced with doubt', we accept as our guide the law declared by the state where the contract had its being."

This case also involves the meaning of a particular set of words in a particular receipt and the federal courts under the Erie Railway doctrine must be guided by the law of Iowa.

III.

Alleged conflict with opinions of other Courts of Appeal.

An examination of the opinions in *Liberty National Life* v. *Hamilton*, (6th Cir.) 237 F. 2d 235 and *Gaunt* v. *John Hancock Mutual*, (2nd Cir.) 165 F. 2d 599, will conclusively show that there is no conflict between them and the decision of the Court of Appeals for the Eighth Circuit in the case at bar. Obviously there can be no such conflict because these decisions do not attempt to determine the Iowa law.

Before the Erie Railway decision on April 25, 1938, many questions of life insurance law were regarded as questions of general law and it was not uncommon to grant certiorari in life insurance cases where there was a conflict in the circuits. For instance in *Ruhlin* v. *New York Life*, 304 U. S. 202, 82 L. ed. 1290, the question of the contestability of disability and double indemnity provisions under the contract in question was regarded in the courts below by both courts and counsel as a question of general law. Certiorari was granted January 3, 1938 (302 U. S. 681, 82 L. ed. 526), on account of conflict of circuits. But the case was decided in this Court a few days after the Erie Railway decision. Mr. Justice Reed quoted from *Mutual Life* v. *Johnson*, 293 U. S. 335, *supra*, and held that the ques-

tion of power was settled by the Erie Railway case and the subject would now be governed by the decisions of the appropriate state court. He said:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts * * *"
>
> "No decision at the present time could reconcile any 'conflict of circuits' or do more than annunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law."

To the same effect are *New York Life* v. *Jackson*, 304 U. S. 261, 82 L. ed. 1329, and *Rosenthal* v. *New York Life*, 304 U. S. 263, 82 L. ed. 1330, decided two weeks later. Both cases were decided in the Circuit Courts before Erie Railway as matters of general law and were remanded for determination under governing state law.

In *Lyon* v. *Mutual Benefit*, 305 U. S. 484, 83 L. ed. 303, decided in January, 1939, the decision of the Circuit Court made prior to Erie Railway was reversed because the Circuit Court acted without any reference to governing state law and did not follow an Arkansas rule of procedure.

Furthermore there is no actual conflict between the decision in this case and the decisions in the second and sixth circuits referred to.

In the *Gaunt* case, 165 F. 2d 599, the receipt was conditioned upon insurability and the approval of the application at the home office of the company prior to the applicant's death. The applicant had taken a medical examination and had been found insurable by the medical examiner but was killed before the approval of the application at the

home office. The lower court found that the application would have been approved if the company had not been notified of the applicant's death. The substance of the opinion is that the receipt which is entirely different from the receipt in the case at bar was ambiguous and having been prepared by the insurance company should be construed against it.

This case is not in conflict with the case at bar for two reasons: (1) In the case at bar the applicant had not been examined and found insurable and the Court of Appeals held that it was conclusively proved that he was not insurable for the plan and rating applied for because of his aviation activities. The Court was thoroughly justified in using the word "conclusively" because the only evidence on the subject was that of the Vice-President of the company who testified that in view of such activities the contract would not have been issued as applied for. If issued it would have contained an aviation exclusion clause or provided for an extra premium; (2) no claim was made in the pleadings or in argument that the receipt in the case at bar was ambiguous and any layman reading it would know that it was a conditional receipt and that the two provisos, good health and insurability, had to be complied with. The Court of Appeals said:

> "From our consideration of the authorities heretofore cited, we believe that the Iowa court would not find the conditional receipt ambiguous * * *"

In the *Liberty National* case, 237 F. 2d 235, the receipt was denominated as a "binding receipt" in the briefs and it referred to "the insurance granted hereunder." The applicant had a physical examination by the Company's examiner and disclosed his entire medical history and the court found that the examination was satisfactory. There

was lay and medical testimony that the applicant was insurable and said testimony was sufficient to raise a question for the jury. Here again the court found ambiguity and resolved it against the Company. It was a Tennessee contract and the court after examining the Tennessee decisions was in doubt as to the local law involving ambiguities as to the time when the insurance would become effective. Certainly the reference to "insurance granted hereunder" would lead the applicant to believe that he was already covered. In the case at bar the receipt was entitled "Conditional Receipt". It recites that it was made "in connection with an application" for insurance and it refers specifically to the "insurance applied for", not to the "insurance granted hereunder". Furthermore, as stated above, there was no evidence in the case at bar that the applicant was insurable on the date of the receipt. On the contrary the evidence showed that he was not insurable for the plan and rating applied for. No claim of ambiguity was made by the plaintiff.

The decision in the case at bar is in line with the decision of the Court of Appeals for the 10th Circuit in *Mofrad* v. *New York Life*, 206 F. 2d 491 and with *Warren* v. *New York Life* in the 5th Circuit, 128 F. 2d 671. Counsel complains because the law is different in different jurisdictions and it is undoubtedly true that the law of insurance varies in different states. The same court which decided in favor of the plaintiff in the *Liberty National* case, *supra*, held that there was no temporary contract of insurance in *Bellak* v. *United Home Life*, 211 F. 2d 280, because there it was bound by the law of Michigan. This divergence of opinion in different states is no ground for granting the writ of certiorari in this case where the Court of Appeals followed the Iowa law. See *Ruhlin* v. *New York Life*, 304 U. S. 202, 82 L. Ed. 1290, *supra*. Certainly it

cannot be said in the words of Chief Justice Taft, *supra*, that "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

Counsel asserts that if the plaintiff had sued in the Sixth Circuit she would have won. There is no basis for this assertion. The decision would have been based on local law. For example, if the contract had been a Michigan contract she would have lost under the law of Michigan as pointed out above, and if she had sued in Tennessee on a contract governed by its law, there is no reason to believe that the Court of Appeals for the Sixth Circuit would have decided in her favor in the absence of ambiguity in the receipt.

Counsel claims that the Court of Appeals erred in not following the Iowa law on the general principles of estoppel. He says that the Liberty National case was decided on the ground of estoppel and that the Iowa law on estoppel is the same as the Tennessee law. We cannot find a word about estoppel in the Liberty National decision; it was based on ambiguity in the receipt. He also says that the dissenting opinion in the case at bar held the defendant estopped under Iowa decisions to set up each and all defenses it claimed. We cannot find the words "estoppel" or "estopped" in the dissenting opinion and it cites no decisions of any court. As we pointed out in the statement of the case, *supra*, there is no plea that the defendant was estopped from asserting that there was no contract of temporary insurance because the applicant was not insurable for the plan and rating applied for. There was no such question of estoppel raised in the lower court or in the original hearing before the Court of Appeals. The Iowa cases on estoppel cited in the petition were not cited by the plaintiff in her brief upon the

original submission in the Court of Appeals. The question was raised for the first time in the petition for rehearing.

We have searched with care the indices in the volumes of the Lawyer's Edition of Supreme Court reports from the date of the Erie Railway case through Vol. I of the Second Series and while we cannot determine how many petitions were filed in life insurance cases we cannot find any where certiorari has been granted involving the construction of a life insurance contract according to state law by a court of appeals where the court of last resort in the state had determined the state law on the question. As a result of the Erie Railway decision, conflict in the circuits has ceased to be a ground for granting the writ where the question involved is decided by a determination of the law of the state. The reason for this is plainly pointed out in Mr. Justice Reed's opinion in the *Ruhlin* case, *supra.*

IV.

No federal constitutional questions involved.

The assertions in the petition as to the violation of the plaintiff's rights under the Fifth and Seventh Amendments seem to us fantastic. They are incoherently expressed and impossible to understand. We have read them several times and we really do not believe they merit a reply. However, we do not like to let them go unchallenged, and we will try to state them in an orderly manner for the consideration of the Court. As well as we can understand them, the claims are as follows:

1. That the Court of Appeals violated the plaintiff's right to due process of law under the Fifth Amendment in the following particulars:

(a) by trying the case *de novo.* Of course there was no trial *de novo.* The court did not pass on the question

of fact determined by the jury. It passed on the undisputed evidence and held that there was no jury question.

(b) by holding that defendant's evidence conclusively showed something the defendant never claimed in pleading or evidence or errors argued. The Court of Appeals held that the evidence conclusively showed that the proposed insured was not insurable for the plan and rating applied for. This was proved by the testimony of the defendant's vice-president (R. 47, 48), there was no evidence in conflict, and there could be no question of veracity involved. It was alleged in Par. 5 of the fourth defense in the answer (R. 11) and urged in the briefs.

(c) by denying the plaintiff a jury trial. Surely it can not be argued seriously that when a case is tried before a jury, and the court holds as a matter of law that there is no jury question, the plaintiff has been denied due process of law under the Fifth Amendment.

(d) by admitting evidence over plaintiff's objection in violation of the parol evidence rule and then holding such evidence to be conclusively true. This is meaningless. Counsel refers to the Note in the Record on page 32 where it appears that he objected to testimony of the agent as to what he told the proposed insured about a decreasing term policy. The only issue of fact left to the jury was whether the proposed insured was in good health on the date of the application. The admission of this testimony could have no possible bearing on this issue and there is not a word in the opinion of the Court of Appeals holding this testimony to be conclusively true.

(e) by admitting evidence in violation of Sec. 511.34 of the Iowa Code and holding such evidence conclusively true. This is also meaningless. Counsel is referring to the testimony of the agent, Bliss, that he asked the pro-

posed insured about his aviation activities and he gave a negative answer which was written in the application before he signed it (R. 32, 35). The Iowa statute referred to provides that if no copy of the application is attached to a policy, the company cannot plead or prove the application in an action on the policy. This is not an action on the policy, but on the receipt. No policy was ever issued and no copy could therefore be attached to it. This ruling could have no possible effect on the question presented to the jury. There is not a word in the opinion holding that Bliss' testimony on this point was conclusively true. Counsel makes a gross misstatement when he says in the petition: "The opinion holds Bliss' testimony is conclusively true." The Court did say in commenting on Bliss' testimony: "We have serious doubt whether there was any substantial evidence to the contrary," but it went on to hold that the question as to who was responsible for the aviation answer was not of any importance on the appeal.

(f) by passing on matters not claimed in the pleadings or in the errors assigned. A reading of the motion to direct a verdict answers this contention. All the grounds of the motion were urged and argued in the Court of Appeals.

2. That the Court of Appeals denied plaintiff a jury trial as guaranted by the Seventh Amendment by holding that the testimony of Bliss, referred to above in Paragraphs 1(d) and 1(e) was conclusively true. We repeat that there is no such holding in the opinion. What the Court did say was conclusively shown was that the proposed insured was not insurable for the plan and rating applied for.

No federal constitutional questions were raised by the pleadings or decided by the Court of Appeals. We cannot

conceive how counsel has the temerity to say to this Court that the opinion violates the Fifth and Seventh Amendments.

V.

No Question As to Federal Jurisdiction.

We do not quite understand why petitioner has urged that there is no federal jurisdiction in this case. Counsel has shown in the appendix to the petition an order of the district court overruling a motion to remand and he asserts that the case was removed to the federal court upon the statement of the defendant that it was incorporated in Massachusetts. In view of this reference we feel justified in stating to this Court that the petition for removal also stated that the defendant was a citizen of the State of Massachusetts, and that the memorandum of the district court on the motion to remand referred to in the order and which preceded the order as printed in the appendix to the petition recites that the petition for removal stated that the defendant was a citizen of Massachusetts and cited the case of *Louisville, C. & R. Co.* v. *Letson*, 43 U. S. (2 How.) 497, 11 L. ed. 353, to the effect that a corporation is a citizen of the state creating it.

The record shows the stipulation of the parties on page 1 to the effect that the United States District Court for the Southern District of Iowa had jurisdiction of the cause and that it was properly removed by the defendant from the State Court to the Federal Court. In spite of all this the petitioner asks this court to remand the case with direction to sustain its motion to remand to the state court.

Needless to say no question of this kind was raised in the Court of Appeals and no question of jurisdiction is before this court upon the petition for a writ of certiorari.

While we recognize that a federal court can on its own motion hold that it has no jurisdiction there is absolutely nothing in the record in the case at bar to justify any such holding.

CONCLUSION.

We submit that this case does not fall within any category stated in Rule 19(b) of the rules of this Court and that there are no special and important reasons for the granting of the writ of certiorari.

Respectfully submitted,

PHINEAS M. HENRY,
Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 28

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 714.

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

I.

Certiorari was granted March 10, 1958, to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this cause, Civil No. 15,740 in said Court.

OPINION BELOW.

The majority and dissenting opinions both upon the original hearing and upon the petition for rehearing are reported in 248 F.2d 879, and were printed in the Appendix to the Petition, pp. A2 to A23 and are now pages 79 to 100 (Transcript of Record). The judgment of the trial court which was reversed appears in the Record, p. 70; opinion, D. C. 147 F.Supp. 547.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under 28 United States Code, Sections 1254 (1) and 2101 (c), providing for review by this Court by certiorari of decisions of a Court of Appeals.

The date of the opinion sought to be reviewed was November 5, 1957. A petition for rehearing was filed in apt time, and was denied on December 6, 1957, and the judgment reversing the District Court became final on that date.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

(1) Procedural due process of law—"* * * nor be deprived of * * * property without due process of law." 5th Amendment to the U.S. Constitution.

(2) "In suits at common law, * * * the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law." Amendment 7, U. S. Constitution.

(3) "The Judicial Power [of the United States] * * * shall extend * * * to controversies * * * between citizens of different states * * *" Article III, section 2, U. S. Constitution.

Iowa Code regulating life insurance companies in substance provides the company must attach to the policy "or of the contract of insurance" any application that "in any manner affects the validity." Iowa Code, Sec. 511.33.

Sec. 511.34, Iowa Code, provides in substance, neglect to comply with above section, the company "shall forever be precluded from pleading, alleging or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in an action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

For exact copy from Iowa Code, see Appendix, hereto, p. 48.

QUESTIONS PRESENTED.

I.

Violation of the Erie Rule by the Court of Appeals.

The Court of Appeals reversed a judgment upon a verdict for a plaintiff wherein the trial court followed the Iowa decisions by the court of last resort both as to *how, when* and *by whom* an insurance company can extricate itself from a printed contract of preliminary insurance made in the state of Iowa, including the Iowa doctrine of "mending his hold".

While the prevailing opinion on appeal purports to be finding what the Iowa law is, it does not follow latest Iowa decisions, but cites and quotes at length from *Mofrad* v. *New York Life*, (10th Circuit) 206 F.2d 491, a Utah contract, and the opinion seems to hold that because that is the Utah law it should be the Iowa law. The opinion is influenced by the quotation and citation from non-Iowa cases set out on pages A10 to A17 thereof, and shows on its face that the majority does not abide by the rule in *Erie Railway* v. *Tompkins*, 304 U.S. 64.

The trial court required a strict compliance with the exact words of the contract as drafted by the insurance company with regard to the "defeasance" clause in accord with the decisions of the Supreme Court of Iowa, which Iowa law is as follows:

> Although an insurance company, even after it learns of the death of insured, may exercise its power under the defeasance clause somewhat similar to that printed herein, when it had previously begun to process the application in its regular channels before knowledge of death, if it completed its customary investigation and determined in the usual course of passing on applications not to issue a permanent policy based upon a good faith finding by those in authority at the home office that he was not insurable because of bad health.
>
> *Reynolds* v. *Northwestern Mutual Life*, 189 Iowa 76, 176 N.W. 207.

> But this power to avoid a contract under the express defeasance clause is terminated by the company giving some other excuse for not performing ("Mending his hold") and power can only be exercised by those authorized by their by-laws, and in the due course of company procedure.
>
> *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 315, 103 N. W. 207.

There was no pleading and no evidence of any attempt of defendant to exercise its power under the defeasance clause, and thus to avoid the contract, within the time and in the manner required by the Iowa decisions.

The Court of Appeals disregarded these decisions of the Supreme Court of Iowa and the holding of the Trial court and Iowa Code, § 511.34, and held on page 18 (R. p. 96) of their opinion that defendant had "made a determination" that Hinkle was not insurable, disregarding the time and manner required. Also defendant never claimed either in its evidence, its pleading, or errors argued, that it ever attempted to make such a determination, and the only evidence was that defendant's General Agent for Iowa tried to "bluff out" the widow into believing that there was no contract of insurance. Their vice president testified they had no record that they had ever received the application (Record p. 47). It also disregarded the spirit of Iowa decisions that defeasance clauses must be strictly followed to avoid forfeitures, if possible, as in *Temple* v. *Fraternal Bankers Reserve Ins.*, 179 Iowa 65, 161 N.W. 102. The clause was not strictly followed, or even put in issue at all and defendant did not claim that it had made a determination in its usual course of procedure and determined not to issue a permanent policy, merely that the application contained false statements. (We point out later that there were no misrepresentations, that the agent kept the only copy of the application signed before the blank spaces were filled in, and filled in false answers after he learned of the death.)

The doctrine, "mending his hold", represented by *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 315, 103 N.W. 207, precluded defendant from asserting any of the defenses it pleaded, except the one it first asserted after Hinkle's death as its excuse or reason for its refusal to perform its con-

tract, and the Court of Appeals reversed on a ground other than defendant first asserted, and thus did not follow the Iowa decisions on "mending his hold".

The Court of Appeals also refused to use the Iowa decisions on the general law of estoppel. The dissenting opinion is an estoppel doctrine.

The Court of Appeals also re-wrote the second "proviso" of the contract relating to "rating applied for", to make it read "amount of premium charged".

Thus, even if the facts were as found by the opinion, they still violate the Erie rule, and it reversed the Trial court because he did not violate such rule.

B. The Court on its own motion passed on a point of Iowa law not assigned as an error, and did not follow any Iowa decisions therein, as follows:

At the time of delivering the printed contract the insurance agent wrote therein in ink the words "immediate coverage". The evidence of defendant also showed that there was printed upon the application, words to the effect that the premium was charged from the date of the application, not the date of the policy, and the vice president testified that if they had issued a policy to Hinkle the due date of the annual premiums would have been the date of the application, not the date of the policy (Record p. 49). The only error assigned or argued with regard to this writing, was that the agent had no authority to write it there, and that the entire receipt was merely an offer, and did not become a contract until accepted by issuing a policy. The written briefs of both parties concerning this writing were confined to the Iowa decisions as to the agent's authority under such circumstances. It was conceded by both parties that if this "receipt" was a contract at all, the

question on appeal was whether under the Iowa decisions the agent had authority. The appellate court refused to use the Iowa cases cited by the parties because it held the words "immediate coverage" did not supersede the conditions that were printed, and thus it was unnecessary to pass upon the authority of the agent. If the court had read the Iowa cases cited in appellee's brief, it would have found that the Iowa Supreme Court considered that under the circumstances of charging a premium during the interval, such a promise does supersede the printed conditions, otherwise the Iowa court would not have taken the trouble to hold that the agent did have "apparent authority" in spite of an express restriction in his agency contract to the contrary—that on that point Iowa follows an estoppel doctrine. The Iowa cases cited and ignored by the opinion are *Nertney* v. *National Fire Ins. Co.*, 199 Iowa 1358, 203 N.W. 826; *Boever* v. *Great American Ins. Co.*, 221 Iowa 566, 266 N.W. 276; *McDonald* v. *Equitable Life Ass. Soc.*, 185 Iowa 1008, 169 N.W. 352, and they show that the Iowa law is opposite to that held by the majority opinion. Could be that Iowa law implies one has insurance if he is charged for it.

The recital of what the Iowa law is without citing any authority, and a refusal to pass upon the Iowa decisions, violates the Erie rule, and also is not procedural due process.

C. To reverse an Iowa trial judge based on "weight of authority" violates the Erie rule.

On page 16 (R. p. 92) the opinion says the trial court erred because he took the position in a colloquy that good health and insurability are synonymous, and thus erred, and then the opinion discusses the split of authority on that point and decides it according to the "weight of authority", without any Iowa cases. We think the Court misunderstood

the Record, and that the trial court held just the opposite of what the opinion understands, but if the trial court did so hold, the opinion violates the Erie rule, for there are no Iowa cases on that point at all, none were cited and none can be found. In a diversity case the Federal trial court is an Iowa forum, and if he held what they say he held, they violate the Erie rule when they say he erred, in the absence of a decision of a higher Iowa court.

II.

The Majority Opinion in This Eighth Circuit Is in Conflict with Opinions on the Same Subject in the Sixth Circuit, Liberty National Life Ins. Co., Inc., v. Hamilton, 237 F. 2d 235 (October, 1956), and with Opinions in the Second Circuit, Gaunt v. John Hancock Mutual Life Ins. Co., 160 F. 2d 599.

The Tennessee decisions involved in the Sixth as to the insurance contract were more favorable to the insurance company than is the Iowa law; but the decisions of Iowa on the general principles of estoppel are the same as Tennessee. *Miller* v. *Lawlor*, 245 Iowa 1144, 66 N. W. 2d 267. Yet, where a Tennessee contract said in one sentence that no insurance was in force until the policy was issued, and said in another sentence words which one might take to mean that it was in force immediately, the Sixth Circuit applied the law of estoppel, and held that the company could not defeat that contract after insured died and it was too late for him to get other insurance. Yet, here the Eighth Circuit, a contract has written in ink "immediate coverage", and it contains no notice like the Tennessee one that a policy must be issued, and where one has every right to believe that if he is being charged premium during the interval of investigation, that he has the insurance that he is paying for—a much stronger case of estoppel than

the Sixth Circuit, yet this Eighth Circuit ignores the Iowa law of estoppel, and relies on a case of a Utah contract that was so different that the case was not even in point.

The practical situation that exists throughout the whole United States that can be corrected only by certiorari herein is:

> "There is no way of getting any recent decisions on these insurance contracts on the applicable state law because insurance companies are removing the trials to the Federal courts, who can only 'bathe the litigants in stale water' unless they can apply modern decisions on estoppel."

And then in the circuits we have conflicting decisions, as illustrated at bar, as follows:

"1. If plaintiff had sued in the Sixth Circuit she would have gotten a directed verdict in her favor on the appeal on the law of estoppel of the state involved.

2. But when she sued and the case could be removed to a court in the Eighth Circuit, she gets a verdict in her favor at the trial, and a directed verdict against her on appeal, plus a holding that the disputed evidence of defendant is conclusively true, and is thus deprived of a jury trial, as guaranteed under the 7th Amendment.

3. But if the case had remained in the Iowa courts she would have a directed verdict in her favor at the trial, no parol evidence would have been admitted to vary the delivered contract, Code, §511.34, would have been followed, and it would have been affirmed by the Iowa Supreme Court.

4. If the case had been in the Second Circuit plaintiff would have a directed verdict against her at the trial, but a reversal on appeal on the ground of strict compliance by the company with its own

words, 'upon the understanding created, not nicety of words' used."

Certiorari in this case is necessary to protect beneficiaries of such contracts, who are usually widows and orphans, who cannot afford the printing expense of long briefs and citations from everywhere as to the "weight of authority", when if we can get a uniform decision of the circuits, the insurance companies will not burden the Federal courts with removal, and the briefs will be short and to the point on state decisions, and there will not be the hazard as to the forum, and the correct ruling for all the circuits is, that the law of estoppel is alike everywhere, and that when an insurance company allows a man to go to his death believing his wife and children are provided for, that they are thereafter estopped to claim otherwise, and more especially so, when they have charged him a premium over the interim so that if he lives and gets a policy he has to pay premium for the interim after it is conclusive that he did not need insurance during that period, but if it is determined during that period that he *did need* it, then the insurance company can prove he does not have it. Mere sense of equity dictates that the universal law of estoppel should apply after he is dead. Plaintiff plead estoppel here.

Federal courts should have a uniform holding that when an insurance company has set up a situation whereby it has the power to charge a man for interim insurance if he lives and gets a policy, but if he dies he does not have insurance, *i. e.*, if he does not need insurance he has to pay for it, but if he needs it he does not have it, is inequitable, and the courts will not assist in such a game as "heads I win, tails you lose". A practical situation, as illustrated herein: Usually the dealing is between the insurance agent and a man at the trial deceased. Such puts it in the power

of the agent to testify to any thing he chooses, and no one alive can contradict him. In this case it so happened that two witnesses did contradict him on all the details of what occurred in Hinkle's office.

At least the Federal courts should have a uniform rule, that when the other party to a transaction is dead, the testimony of the insurance agents is not conclusively true even if it is not contradicted; and where as here, it was contradicted, the Federal courts should not do as the majority opinion did herein and hold the agent's testimony is conclusively true. Also, even if there were no statute like Iowa Code, Sec. 511.34, the fact the agent did not give insured a copy of his application opens the door to fraud too much, gives every insurance company absolute power to falsify applications, and thus to defeat a man whose lips have been sealed in death. The Federal rule should be that the failure of the insurance agent to deliver insured a copy of his application shows such a lack of good faith, as to make that agent's testimony, not conclusively true, as held herein, but always a jury question even when it is not contradicted by the circumstances.

III.

Court of Appeals Violated Plaintiff's Rights under 5th and 7th Amendments.

Compared with the record of the issues, grounds stated in the motion for directed verdict, and errors assigned and argued on appeal, the opinion in ordering a directed verdict for defendant, is a violation of plaintiff's right under the 5th Amendment to the U. S. Constitution to due process of law. It is not due process to try a law action *de novo* on appeal, and to hold the defendant's evidence conclusively showed something defendant never claimed in pleading,

evidence, or errors argued, denies a jury trial, and is not the "rules of the common law."

Also, when the trial court admitted evidence over plaintiff's objection in violation of the parol evidence rule, and of Iowa Code, Sec. 511.34, under a ruling that he would take care of it in his instructions, that part of the opinion that holds such evidence was conclusively true and orders a directed verdict for defendant thereon, violates plaintiff's rights to due process of law under the aforesaid amendment.

It was not due process for the Court of Appeals to re-write the clause that used the term "rating applied for" and substitute for such the term "amount of premium charged by the company", or to construe the words used to mean the latter, in the absence of any evidence that "rating applied for" means the latter. It is not due process to substitute the legal knowledge of an insurance attorney, for the understanding of an ordinary person, even assuming the understanding of the attorney is correct. And if there had been evidence introduced to that effect, it still is not due process to hold such evidence conclusively true when both parties have demanded a jury trial.

The Court of Appeals denied plaintiff a jury trial as guaranteed to her by the 7th Amendment to the U. S. Constitution, by holding that evidence offered by defendant of a transaction with a man deceased at the time of the trial was conclusively true, and more especially so when defendant's witness was contradicted on all his details by two other witnesses, and when the physical appearance of defendant's exhibits contradicted defendant's witness, and where the facts testified to were contrary to human nature.

IV.

A Removal by a Corporation Does Not Fall Within the Judicial Power of the United States, and the Trial Court Erred in Overruling Plaintiff's Motion to Remand, As a Corporation Is Not a Citizen of Any State, and the Case Is Not "Between Citizens of Different States".

The platitude followed since 1844 has no basis in law when applied to *Removals*. Letson case does not permit *Removals*.

STATEMENT OF THE CASE.

On February 25, 1955, defendant executed and delivered to Max Hinkle in Iowa a contract of life insurance, as follows:

CONDITIONAL RECEIPT DO NOT DESTROY.

Received Twenty One and 70/100 Dollars in connection with an Application made this day to the New England Mutual Life Insurance Company, of Boston, Massachusetts,
for Insurance of $10,500 on the life of W. Max Hinkle
Immediate Coverage

The Insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft given in payment of

this premium is not paid on presentation, this receipt shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Countersigned 2/25 1955

Philip C. Raye
Secretary

Rodney Bliss, Jr., General Agent

If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt the premium will be refunded.

At that time Hinkle signed an application form prepared by defendant, primarily in blank at the request of defendant's agent, who intended to fill out the blank spaces later. No copy of the application was delivered to Hinkle. The delivered contract was detached from the form, and was delivered as a complete contract in itself. At that time the "General Agent" of defendant wrote on the delivered contract in ink the words "immediate coverage," before delivering it. At the trial defendant produced the application and offered it in evidence over the objection of plaintiff that it violated the parol evidence rule and defendant was prohibited by Iowa Code, Sec. 511.34, from making any use of it because no copy of it was delivered to insured. The court ruled that he would take care of it on the instructions (Record p. 32). There was dispute in the evidence thereafter as to whether the agent wrote false answers concerning Hinkle's pilot's license into the application after Hinkle died, or whether Hinkle told him false answers to the questions concerning being a pilot. A view of this application is important for plaintiff claims that it shows on its face that those false answers were written under different conditions than the other writing

appears. It was not disputed that all handwriting on the application was that of Agent Bliss, except Hinkle's signature. Two witnesses who saw Bliss writing said Hinkle's desk was so crowded that Bliss wrote on a pull out board. Bliss denied this. We mention this dispute in testimony because the appellate court held the trial judge erred in not directing a verdict for defendant on all this disputed testimony. The jury could well have found that those false answers were put on that application after the agent learned of Hinkle's death. At the time defendant put this application in evidence it was still blank as to the essential information, such as "amount, plan, and rating applied for."

The above is important because the Court of Appeals (R. p. 91) based its opinion of reversal on the defeasance clause of the contract, which read as follows:

> "*but if the Company determines* that the Proposed Insured is not insurable,* (for the amount, plan, and rating applied for) said application shall be declined and the amount paid will be refunded upon return of this receipt".
>
> *(This part is taken by reference from the clause above it.)

and held the evidence conclusively showed Hinkle was not insurable for the 'amount, plan, and rating applied for", in the face of the application being absolutely blank as every one of these three things, and in spite of the fact the vice president of defendant testified that Hinkle was insurable for every plan they had, and for any amount they had (R. p. 48). The first clause of the receipt said: "The insurance applied for shall be in full force from this date, provided, he is in good health", etc.

Going back now to the time of delivery of the "receipt", defendant's agent called its examining physician on

Hinkle's phone, and the examination was set for the following Monday at 11:45 a.m. There is conflict in the evidence as to why this was. Mrs. Hanson, a stenographer who heard the conversation, testified that Bliss told Hinkle the doctor had said over the phone that he could not examine him until Monday, whereas Bliss testified Hinkle was the one who requested that the examination be set for Monday. Both courts held that the fact that it was set for Monday was the important thing, and it was not material who requested it, as by agreeing to it such condition was waived until Monday, and after that it was excused because of impossibility. And the Court of Appeals held, that the "receipt", "can not fairly be construed to add the medical examination as an additional condition precedent." (R. p. 91). We mention this because after so holding, to direct a verdict on any other ground than that first elected by defendant violated the Iowa rule on "mending his hold", for defendant in its answer, paragraph 10 of its "second defense" pleaded that its agent notified attorney for Mrs. Hinkle that there was no insurance in force because Hinkle had not taken a physical examination (R. p. 9), and Mrs. Hinkle testified that the same agent told her that they would not pay because Hinkle had not taken a physical (R. p. 29). And thus under the Iowa decisions defendant was limited to that one defense.

This contract was made and dated on Friday, February 25, 1955. Hinkle was killed the next day.

It was the custom of Mr. Hinkle to fly his own airplane to Omaha, Nebraska, on Saturday mornings to give instruction in flying to the Iowa-Nebraska Air National Guard, of which he was an officer.

On Saturday, February 26, he got up before his wife did, got his own breakfast and left for the airport. When

Mrs. Hinkle went to the kitchen for her breakfast she found this contract in suit on the kitchen table where her husband had put it as he left for the airport. This fact is important for it shows defendant led Hinkle, until after it was too late, to believe he had protected his wife and children with insurance. It supports plaintiff's express pleading of estoppel. About 8 o'clock Saturday morning after Mrs. Hinkle had found this "receipt" on the kitchen table, her neighbors came with the news that her husband had been killed.

About two weeks after Hinkle's death, the General Agent of defendant called Mrs. Hinkle and denied liability on the contract, on the ground that Hinkle had not had a physical examination. At no time since Hinkle died did defendant take any steps to exercise their power under the defeasance clause to avoid their contract.

After denying liability for an invalid reason (R. p. 29; R. p. 9), defendant's agent did write Mrs. Hinkle a letter on May 19, 1955, almost 4 months after Hinkle died, in which he enclosed the check, but the letter gave no reason for same in addition to what he had already told her on the phone (Def. Ex. G., R. p. 41). The defeasance clause required them to determine in their customary manner whether to issue a policy, then to return the premium on the ground that they had so determined, and to get the receipt back. They did none of these three requirements. We mention this because the appellate court held on page 16 (R. p. 96) of the opinion that "defendant made a determination that Hinkle was not so insurable". The fact was, defendant claimed the agent had never sent the application to the home office. All they ever did was to bluff the widow into a belief there was no contract. They never made a determination as required by the two Iowa de-

cisions we cite, at the home office by the proper committee, and in the usual course of time for such determination.

Plaintiff's pleading was in the alternative, either as administratrix, or as beneficiary, and pleaded the contract as unconditional because of the words in ink, "immediate coverage", and if such did not supersede the conditions, then sought recovery on it as a conditional contract. In its answer defendant failed to put performance of the condition of good health, in issue in that it did not comply with Federal Rule 9(c), which requires "A denial of performance or occurrence shall be made specifically and with particularity". Instead of complying with that rule defendant pleaded that it did not have knowledge as to his good health. However, the trial court submitted the question of health to the jury under an instruction that there was sufficient evidence of good health, that the jury should consider the circumstances, the presumptions, and the medical examination when his pilot's license was renewed, which was in evidence. No objections were taken by the defendant to any of the court's instructions to the jury. No motion for directed verdict was made by defendant at the close of plaintiff's evidence. At the close of all the evidence defendant made its first and only motion for directed verdict, on the grounds stated therein. It did not contain any ground concerning good health, and did not contain any ground to the effect that they had performed the defeasance clause. Their basic theory was that it was only an unaccepted offer, and they did not have to avoid it.

The answer of defendant pleaded as defenses: 1. that no contract ever existed because it was an offer that had never been accepted; 2. that they had never received the report of the medical examiner mentioned in the second proviso (Both courts held against them on this as it was

the fault of this agent (R. p. 92) and was not a condition (R. p. 91)); 3. that the agent had no authority to write on the receipt "immediate coverage"; 4. that defendant violated an Iowa statute by dating the contract prior to a physical; 5. that Hinkle misrepresented his pilot's license, etc., and was thus not insurable—no allegation that they had determined such fact in the time, manner and by whom, as required in the Iowa decisions, *supra*. As to the defenses, that he was not insurable "for the amount plan and rating applied for", the application was blank as to those three facts. The trial court held defendant had not established any of its defenses and that if Hinkle was in good health on the date of the application plaintiff was entitled to recover, and submitted that fact to the jury. No objection was taken to this and no error assigned on it. See Iowa decisions on, "mending his hold" *ante*.

To comply with Iowa procedure plaintiff pleaded facts which worked an estoppel on defendant as to defenses pleaded by defendant. This pleading is printed in Record pp. 24-28.

We mention this fact because the Iowa decisions concerning the apparent authority of the agent to waive conditions and promise immediate coverage, are based upon the fact they are charging premium over this interim, and the reasons stated in those opinions show that it is on the ground of estoppel; and what the Iowa decisions on "apparent authority" actually hold is that when the insurance company has the power to charge a premium for the interim, it is estopped from claiming there was no insurance during that period.

Defendant's evidence, including the application, shows conclusively that defendant would have dated the policy the

date of the application (R. p. 49), and had printed on the application (Def. Ex. D, R. 36, 40, 20) that the due date of the premium was the date of the "receipt", not the policy, that is, they charged premium over the interim.

The trial court got both parties to agree that Mrs. Hinkle should recover as beneficiary, rather than as administratrix, to simplify the instructions. The trial court overruled defendant's motion for directed verdict, and submitted the case to the jury under instructions. Defendant did not object to any of the instructions. The jury returned a verdict for plaintiff, and the court entered judgment thereon, which judgment is printed on Record p. 70. Thereafter defendant made Motion for Judgment Notwithstanding Verdict, on the ground of lack of sufficient evidence of good health of Hinkle. The court overruled this motion. There is no such motion in the Federal Rules, and if there were it lies to defects in pleading, not to defects in evidence, and is not "according to the rules of the common law". See 7th Amendment.

Thereafter defendant appealed and argued specified grounds of error as to why his motion for directed verdict should have been sustained, none of which was that it had performed the defeasance clause. The Court of Appeals ordered a verdict directed for defendant on a ground not raised or argued, to wit "that defendant made a good faith determination that he was not so insurable." (R. p. 96). The dissenting opinion thought defendant was estopped under Iowa decisions to set up each and all defenses it claimed. The majority ignored the Iowa decisions. Plaintiff petition for rehearing, mentioning the above Iowa decisions, and other omissions, and asserted the opinion violated her rights under the 5th and 7th Amendments, and called attention to the fact plaintiff had pleaded and proved

an estoppel under the Iowa decisions on estoppel on defenses claimed by defendant. Such petition was immediately denied.

BASIS OF FEDERAL JURISDICTION.

Plaintiff filed her petition in the Iowa state court of original jurisdiction. Defendant in due time removed the case from the state court to the Federal District Court, stating that plaintiff was a citizen of Iowa, and defendant was incorporated in Massachusetts. Plaintiff filed Motion to Remand, in which she pleaded that defendant was not a citizen of Massachusetts, or any state, and that 11,000 shareholders of defendant were citizens of Iowa, the same state as plaintiff, and offered the certificate of the Insurance Commissioner of Iowa to prove it. The court ordered briefs filed on the subject. The court eventually overruled the Motion to Remand, and the ruling is in Appendix, p. A1 (See R. p. 79). Defendant is estopped from claiming there is no Federal jurisdiction. Plaintiff does not want to claim it if the Court will reinstate the judgment of the District Court.

When, and if, this Court holds that the judgment of the District Court should be affirmed on the merits, but at the same time holds that there was no removal jurisdiction, a question of Federal law then arises as follows:

(1) When a defendant removes a state case to a Federal court, and thereafter resists a motion to remand it, the Federal common law, incident to the conduct of the Federal court system, imposes upon defendant a quasi-contractual liability, or an implied promise, to perform any judgment rendered against defendant, should it later be determined after judgment that defendant had taken it to a court that had no jurisdiction.

CASE OF FIRST IMPRESSION.

(2) The common law of Iowa is as above stated, when the removal occurs in Iowa, and if there should be no Federal common law incident to the conduct of its courts, this court would not violate the Erie rule if it found the Iowa law to be as above, as a case of first impression in Iowa.

SUMMARY OF ARGUMENT.

I. **Violation of Erie Rule by Court of Appeals.** The trial court got the result that an Iowa court would have reached, and it was impossible, under Iowa decisions, to prove he erred in overruling defendant's Motion for Directed Verdict. The majority opinion on appeal states the holding in one Iowa decision (R. p. 91) *Reynolds*. but instead of applying the facts as shown by the Record, in the light of other Iowa decisions to the rule as stated therein as to the "defeasance clause", the majority was so influenced by cases from other jurisdictions and tried to get a result reached in those jurisdictions. Some cases it cited were from states that held such "receipts" were merely unaccepted offers. It eventually held that the evidence conclusively showed that defendant had exercised its power under the defeasance clause, in the face of the record that showed defendant never claimed that it had. but claimed that no contract existed until defendant had rejected it and that it had never so rejected it.

The majority opinion ignored Iowa decisions that such was a contract until a policy was rejected; (1) after a determination by defendant that applicant was uninsurable, (2) and such passing on insurability had to be done in the regular course of passing on policies, at the home office, (3) and before some other excuse was given for nonperformance, *i.e.*, "mending his hold" doctrine of Iowa.

Majority opinion also ignored Iowa decisions on estoppel, and did not apply such doctrine to defendant having led Hinkle into belief he was insured for the interim, by its conduct, words used, arrangement of clauses, expressly writing in ink, "immediate coverage", and act of charging premium over the interim. Also ignored Iowa decisions that contract must be construed strictly against insurance company that drafts it, and ignored Iowa decisions of intendments against forfeiture, and construed the language strictly in favor of insurance company, and assumed without evidence, and held evidence of defendant, conflicting with human nature, conclusively showed that contract meant what defendant claimed it meant, which only an insurance underwriter would understand it meant, instead of construing a contract between two parties as to what one unexperienced in insurance terms would be led by the experienced one to think it meant, and rewrote the contract for benefit of insurance company.

B. Ignored Iowa decisions cited by appellee relating to authority of agent to promise immediate coverage, and, when the only ground for directed verdict claimed relating to the written words "immediate coverage" was lack of authority of the agent, held such words did not change the printed contract, where the decisions from Iowa indicate there is an imposed liability (unconditional) when premium is charged over the interim. From language used in these Iowa decisions, it is impossible for any outside court to say the trial judge did not follow the Iowa cases. Compare them with his ruling in 147 F. Supp. 547.

C. Majority held trial judge erred as to whether insurabilty and good health are the same, admitted there was a slit of authority, but determined he held against the "weight of authority", and such violates the Erie rule, he sat as an Iowa court, and there are no Iowa decisions of any higher court on that point of law.

II. **The Majority Opinion Conflicts with Opinion on Same Subject in Sixth Circuit, and in Second Circuit,** in that the Sixth applied the doctrine of estoppel of the applicable state law, and interpreted the contract the way insurance company led insured to believe it meant, and held could not exercise defeasance clause after insured died—same as advocated by the dissenting opinion herein; and Second Circuit held somewhat the same, and that insurance contracts are to be construed to mean what a layman would construe them to mean, not what they would mean only to an insurance underwriter.

III. **Violates 5th and 7th Amendments.** By holding evidence conclusively showed defendant had exercised its powers under the defeasance clause when there was no such evidence, and by taking judicial notice that words used in the contract conclusively meant what some lawyers might imagine an insurance underwriter thinks such words mean, or by assuming there was evidence of what they meant, and defining them differently than the dictionary, the court deprived plaintiff of her judgment without due process, and also denied her a jury trial on such issues. Also it is not due process to reverse a judgment in a law action on an error not raised in the court below, or not assigned as an error on appeal. Compare what majority did with *Reid* v. *Maryland Casualty Co.*, 63 F. 2d 10, Fifth Circuit.

IV. **No Federal Jurisdiction Because** cases relied on by defendant to sustain Federal jurisdiction, do not apply to *removals* by corporations, but are cases preventing corporations from defeating the right of a citizen to elect to use the Federal courts, and just the opposite would apply to the situation at bar, and they were decided before the 14th Amendment expressly defined who were "citizens * * * of the States wherein they reside".

B. A question of Federal law arises for the first time if this Court holds for petitioners that the judgment of the trial court should be affirmed, and also holds that there was no removal jurisdictions, and it will then be a case of first impression as to what the Federal common law is.

ARGUMENT.

The only defense seriously urged by defendant was that no contract ever existed because the "receipt" was an offer, and could only be accepted by the committee headed by Second Vice President Arnold; that such committee had never passed upon it (See R. pp. 46, 47). They used this witness, Arnold, to prove that the authorized committee had never passed upon Hinkle's insurability. Two weeks after Hinkle's death Bliss, General Agent for Iowa, called the beneficiary and told her they would not pay because Hinkle had not had a physical examination (R. p. 29). For four months, and until May 19, 1955, Bliss kept bluffing her into a belief there was no contract of insurance, and on such date mailed the premium check to her, stating no reason. If we believe defendant's witnesses, the agent never sent the application to the home office, but relied upon his skill in bluffing this little woman into believing there was no contract.

The insuring clause of the "receipt" was, "the insurance applied for shall be in effect from this date" provided he is in good health; and the defeasance clause was, "but *if the company determines* that the proposed insured is not so insurable, said application shall be declined", etc. There was an intervening condition between the insuring and defeasance clauses "provided" the report of the medical examiner is received in the home office, etc. Both courts held the medical examination showing matters which we

discuss later was excused because defendant had prevented it from occurring by setting the medical examination for Monday (R. p. 92) and the Court of Appeals held the medical examination was not a condition precedent (R. p. 91).

The gist of the case is, what does it take under the Iowa decisions for defendant to perform this defeasance clause and thus work a forfeiture of this contract? The trial court thought that under the Iowa decisions, and the evidence of Vice President Arnold, that the "determination" as to whether Hinkle was insurable, etc., had to be performed in the home office in Boston by the proper committee, and that under the Iowa rule of "mending his hold" the company had to do this before they had assigned some other excuse for not performing their contract. Such is the Iowa law as announced by decisions of the highest court of Iowa. *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 314, 103 N. W. 207, and approved recently in *Craddock* v. *Life Assn.*, 225 Iowa 744, 285 N. W. 169. The appellate court reversed on this ground, and reached its conclusion as to what the Iowa law was by lengthy quotations from cases decided from almost everywhere, Missouri, Utah, Tenth Circuit, New York, and many others, which appear on pages 10, 11, 14, 15 (R. 88 to 94) of the majority opinion. They did mention the Reynolds case from Iowa, and then failed to follow it. They ignored completely the other Iowa decisions, and when reminded on Rehearing, refused to let it be decided by the full bench. They quoted from appellant's brief, which was 61 pages of citations and quotations, from decisions other than Iowa, trying to prove what the "weight of authority" was. The correct Iowa law was quoted in Appellee's Brief, page 23, from the Reynolds case as follows:

> "but if the company, IN THE PROPER EXERCISE of its legal rights under the law and contract which it is unnecessary for us to define in this opinion, REJECTS THE APPLICATION, *upon the ground that the applicant is not insurable*, and returns the premium paid, no liability can arise thereunder."

The reason it was unnecessary for the court to define what the proper method of passing on insurability in the Reynolds case was, that in that case there was no dispute but that the proper committee in the home office had followed the company's usual procedure in the proper course of time and in its regular order, and had determined that that applicant was not insurable, but before they had made their final decision they learned of applicant's death from heart disease, which they had already determined from independent rating agencies he had. There was no question there but that they had followed their usual procedure of passing on applications. There was no pleading or other claim of estoppel in that case, and the court did not pass upon any law of estoppel. The Iowa court merely held that the company could continue and complete their usual procedure they had started before his death, and make the final determination even after his death. But the Eighth Circuit holds herein, that because of the other non-Iowa cases cited and quoted from by the majority opinion, this defendant did not have to follow the procedure called for in the Reynolds opinion. And it also refused to follow the additional Iowa decision of *Farmers Milling Co.* v. *Ins. Co., supra,* which holds that an insurance company cannot avoid a contract by performing the terms of the defeasance clause after it has previously given some other excuse for not performing it, *i. e.*, the Iowa doctrine of "mending his hold". This *Farmers'* case, *supra*, further holds that the secretary of the company is not the proper one to perform the defeasance clause, but it must be passed

upon in the usual course by the board of directors, or whatever functionary is provided by the by-laws, which in the case at bar would be the committee at the home office that passes on applications, as testified to by the vice president on page 47 of the Record.

Another reason pleaded by defendant that there was no contract was, defendant claimed it violated an Iowa statute for the regulation of insurance companies that said in effect that no insurance company should issue a policy for over $10,000 that did not contemplate a physical examination. The trial court ignored this defense for three reasons: (1) the statute did not make the contract void, (2) this contract was not a violation of the statute, and if it were, (3) defendant could not claim the benefit of its own wrong. The appellate court thought it was unnecessary to pass upon this statute because they were reversing anyway, but in so doing indicated it would not follow the Iowa decisions on estoppel. Plaintiff had pleaded at length the facts of estoppel on this point and had argued fully that by printing these contracts for use in Iowa defendant either interpreted the statute to permit what defendant was doing, or had willfully violated it, that they had misled Hinkle, and could not claim the benefit of defendant's own wrong, which the majority impliedly indicates it will do. We cannot afford this certiorari, to say nothing of a second one.

On page 18 (R. p. 96), the majority opinion says, "There was no time for investigation prior to the applicant's death." Defendant knew when it printed these contract forms such might be the case of any applicant. Insurance companies dictate their own contracts, and under Iowa decisions they must follow them the way they print them, and follow them strictly. By the part of the opinion quoted above, the majority refused to follow other Iowa decisions

to the effect that such contracts are to be followed strictly the way the insurance companies draft them, and that every intendment is against a forfeiture, as represented by *Temple* v. *Fraternal Bankers Reserve*, 179 Iowa 65, 161 N. W. 102. However that may be, there was plenty of time after Hinkle's death before they assigned some other reason, to perform strictly the defeasance clause, if the Reynolds case is liberally construed. If instead of bluffing the little woman with some other excuse the company had taken the position that this "receipt" was a contract, instead of claiming it was only an unaccepted offer, and had proceeded to comply literally with the defeasance clause, it might have avoided the contract under the rule in the Reynolds case. But surely one is not avoiding a contract when he puts in his time insisting that it is merely an offer. The defendant's Answer is incompatible with the above expression of the majority opinion.

While it is true under the present rules of civil procedure, both Iowa and Federal, a defendant may plead inconsistent defenses, it seems not due process of law for an appellate court to hold "evidence conclusively shows * * * defendant made a good faith determination that he was not insurable" (R. p. 96), when defendant failed to plead or prove that he made such determination when he was permitted to so plead, and when his pleading and proof was directed to the point that no such determination was required because no contract had ever come into existence (see R. p. 47, 6th line from top).

I.

The Majority Opinion Violates the Erie Rule in the Following Respects:

Under Iowa decisions on the general principle of estoppel, defendant was *not* entitled to a directed verdict

on any ground mentioned in its motion, or on any ground the majority opinion discussed, as long as it was possible for a jury to find from the conduct of defendant, their act of charging and collecting the premium over the interim, or the words defendant printed or wrote on the "receipt", that defendant had caused Hinkle to believe to the time of his death that he had interim insurance.

> (1) Where one by his conduct has led another to rely on the existence of any fact or condition (even a naked promise), or to believe he has a contract, until it is too late for him to otherwise protect himself, the first one is estopped to assert later such fact or condition or contract does not exist. Defendant is thus estopped to claim Hinkle did not have immediate coverage.
> *Miller* v. *Lawlor*, 245 Iowa 1144, 66 N. W. 2d 267.

It took two judges of the Court of Appeals 10 printed pages (R. pp. 86 to 96), with the aid of a 61 page brief filed by good attorneys, and quotations from A. L. R., and from more than 20 cases cited and quoted, and the benefit of the "weight of authority" to finally determine what this "receipt" meant. How could the law expect an ordinary applicant to understand what the "receipt" means, in one sitting of less than a half hour when they write in ink "immediate coverage," and when the first sentence says the insurance is effective at once, and he knows he is charged premium from the date of the application? Surely an ordinary man is led to believe that he is getting what he is paying for. To refuse to apply estoppel in these contracts, would require a holding that an ordinary man without the aid of a law library who never heard the "weight of authority" is bound to know more than the lawyers and judges.

Under Iowa decisions on "mending his hold" defendant was *not* entitled to have its motion for directed verdict

sustained upon the ground held by the majority opinion because such was not the ground defendant first elected as its reason for refusal to perform its contract. *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 314, 103 N. W. 207.

The reason first elected by defendant for not performing was that Hinkle had not had a physical examination (R. pp. 9, 29, 91). The Court of Appeals held on page 91 of the Record,

> "The conditional receipt on the basis of the words it contains can not fairly be construed to add the medical examination as an additional condition precedent."

Thus under the above cited case on "mending his hold", there was nothing further to decide, and when the Court of Appeals proceeded after the above quoted holding and discussed the weight of authority, and then five pages later on page 96 of Transcript of Record, held:

> "The evidence conclusively shows * * * that defendant made a good faith determination that he was not so insurable"

and later on the same page said,

> "Any delay in the investigation under such circumstances was in no way prejudicial to plaintiff"

they violated the Erie rule by not following the Iowa decisions on "mending his hold", and in addition to that violation, they based their reversal on a ground for a directed verdict not mentioned in defendant's Motion for Directed Verdict, and in addition to that they based it on a finding of fact that the defeasance clause had been performed, when defendant never even claimed that it had performed such clause, never claimed it had made such determination, but claimed just the opposite, and that the Iowa agent had never sent it to the home office (R. p. 47, 6th line).

We submit, therefore, that by the above quoted parts of the prevailing opinion the Court of Appeals violated the Erie rule in three respects, also ordered a verdict directed on a ground not mentioned in the Court below, and thus violated due process under the 5th Amendment, and based such finding on "conclusive" evidence, when the evidence of defendant claimed just the opposite of what the opinion says the "evidence conclusively shows"; and violated the 7th Amendment.

The majority opinion amends the second clause used by defendant, and re-writes such clause relating to "rating applied for", by striking out the words "rating applied for", and substituting therefor, "premium charged by the company". Unless they can make that change and re-write the contract defendant printed, there is no possible ground to direct a verdict for defendants. We submit the Court of Appeals had no right to so re-write defendant's contract. There is no evidence that "rating applied for" means the "amount of premium charged". Instead of following strictly the wording of the contract the way the insurance company drafted it, as required by Iowa decisions, *Temple* v. *Fraternal Bankers Reserve*, 179 Iowa 65, 161 N. W. 102, the Court re-wrote the proviso to make it more favorable to the company than the company had drafted it themselves.

An applicant does not apply for any rating, whatever "rating" means. See the Application (R. p. 19). There is no place on it for him to apply. If it means the "amount of premium charged", as assumed by the majority opinion, he still does not *apply* for it, they assign it to him. Hinkle was insurable for the amount, plan, and every rating he applied for, because he never applied for any rating regardless of what "rating" means, and they never

intended for him to because they provided no place on the application for it.

The word "rating" does not mean "the amount of premium", in any dictionary you can find. The Iowa decisions do not permit an appellate court to add words to a contract in order to put the trial court in error. Also, applicants do not apply to insurance companies for "ratings", such is the business of mercantile credit agencies.

Neither the court nor jury can substitute their own knowledge (here of what two parties intended) for evidence. *Downing* v. *Farmers Mut. Fire Ins. Co.*, 158 Iowa 1, 138 N. W. 917. A court can not take judicial notice of the meaning of any word unless the dictionary gives only one meaning, and if the dictionary gives more than one meaning, it is a question of fact which of the possible meanings was intended (by Hinkle as well as defendant). It can take judicial notice only of such propositions of generalized knowledge as are so notorious as not to be the subject of reasonable dispute. Rule 801, American Law Institute Model Code of Evidence. Cyclopedic Law Dictionary, Third Edition, Callahan & Co., defines "rating":

> "The estimate put on the credit and financial resources of a person."
>
> "The order or class of a vessel according to her magnitude or force."

We submit the appellate court has no basis for what *it thinks* "rating" means.

We submit the Court of Appeals violated the Erie rule when it went outside of Iowa for its quotations and failed to follow the four Iowa decisions we cite herein, contained in 245 Iowa, Miller, 187 Iowa, Reynolds; 127 Iowa, Farmers Mill. Co.; and 179 Iowa, Temple case, and the trial court was correct and it was error to reverse the

trial court, and the majority opinion was not "by the rules of the common law".

B. The majority opinion's view of the effect of the words "immediate coverage" written in ink by the insurance agent, falls also under the Erie rule, which we have pointed out under Questions Presented. If they had read the Iowa cases we cited (cases page 7 *ante*) they would have found that there is an element of estoppel, which the Iowa court calls apparent authority, that is binding on a Federal court in a diversity case, or that by charging a premium over the interim, they have impliedly promised the man that he has what he is paying for.

From the instructions given the jury by the trial court and from his ruling printed in 147 F. Supp. 547, he held the Iowa law to be that there was insurance from the date of the "receipt" if Hinkle was in good health. He did not specify whether he so found from what is said in the Reynolds case, or what is said in the Nertney case, or because they never performed the defeasance clause. From the Nertney case he could have found that the Iowa law is that if the company is charging premium from the date of the "receipt", *the law imposes, or implies a promise, regardless of the language printed, to insure over the period covered by the premium.* If he based such on either of the above Iowa cases an appellate court could not prove he was wrong as to the Iowa law, because, *Nertney* v. *National Fire Ins. Co.*, 199 Iowa 1359, 203 N. W. 826, contains language indicating the Iowa court would so hold, in case the agent had not expressly promised immediate coverage.

The *Nertney* case, above, was on fire insurance and the agent had in writing promised immediate coverage, and the point of law raised was as to his authority in view of a clause in his agency contract expressly denying him

such authority. The Iowa court, in holding that he did have such authority in spite of his contract, after observing that the policy when issued would be dated the date of the application, said:

> "No one would be expected to take out insurance for a period of time that had elapsed, but, unless there is a valid preliminary contract of insurance covering the time between the making of the application and its acceptance or rejection, that is what every insured who receives such a policy is required to do. The injustice of saying that, on the acceptance of the application, the insured has had protection from the prior date where no loss has occurred, where it is also said that he is not protected if a loss did occur, is plain."

Then the Iowa court went on to hold that the company could not deny that the agent had authority. The reason the court gave, however, would be just as good a reason for saying that the *law imposes insurance* for the interim if the company charges a premium over that period. The issue was only the agent's authority, so it was unnecessary to pass upon whether there was any imposed liability, and the court did say that it was not passing upon an imposed liability, in the following language:

> "We are not to be understood as saying that, in the absence of any agreement for preliminary insurance covering the interim between the making of the application and the acceptance or rejection of it by the company, the mere fact that when, or if, the application is accepted, the policy would cover the risk from that time * * *."

It is a hint to the Iowa bar to claim such next time. Then they held the agent did have authority to promise immediate coverage because it was the custom to charge premium over the interim.

The Iowa opinion does not say that if the agent had not expressly promised interim coverage, that none was implied, but merely intimates that it is not necessary under the facts to go so far as to hold implied or imposed coverage. The reason given and the cases cited, however, as quoted above, is just as sound for imposed, or implied promise of, coverage as it is for "apparent authority." Thus, if the Federal trial court believed that such is what the Iowa Supreme Court would hold if necessary, it is a violation of the Erie rule for the Court of Appeals to hold that he was wrong as to the Iowa law. The whole spirit of all the Iowa cases is that if the company is charging premium over the interim, there is insurance coverage over that period.

While defendants offered evidence (over objection of plaintiff) to the effect that the words in ink "immediate coverage" meant "decreasing term policy", in ruling on a motion for directed verdict the Court of Appeals should not take such evidence as conclusively true, so, if it is possible for "immediate coverage" to mean "immediate coverage" it could not hold that the trial court erred in not directing a verdict, for the trial court held, either: (1) the agent expressly promised "immediate coverage", even though it is not conclusive as to what the term was intended to mean, in which case he had authority to so promise, or (2) it is immaterial whether he promised "immediate coverage" or not, or whether he had authority, because the Iowa law is that there is an implied promise, or an imposed liability, if they are collecting a premium over the interim. If he held either of the above, the Court of Appeals violated the Erie rule if they hold he was wrong.

Now, as to the facts, on the above point of law. On page 20 of the Transcript of Record appears the reverse side of the Application, Exhibit D (Def. Ex. D, R. pp. 36,

40, 20) and there is printed thereon by defendant the following:

> "2. If the premium is paid on the date the Application is signed the policy will usually bear that date, if issued as applied for."

Vice-president Arnold of defendant company testified (R. p. 49),

> "If we had issued a policy in this case we probably would have made the due date of the premium the date of the application." * * * If it had been made on this Monday (medical examination) following the application and had gone through, the due date of the premium would have been the date of the application."

It goes without saying that the "receipt" shows that Hinkle did pay the first premium on the date of the Application.

Thus under the Iowa decisions there is either an imposed liability, or the agent has "apparent authority" to promise immediate coverage, and to hold that it was error for the trial court not to direct a verdict for defendant in view of the above evidence, violates the Erie rule even if the agent had not expressly written in "immediate coverage"; and to assume *conclusively* that immediate coverage means something else, or does not add to the printed promises is not due process of law.

C. The trial court in a colloquy with defendant's attorney made some remarks in the absence of the jury which the Court of Appeals holds was error (R. p. 92). We have adequately presented that in our Questions Presented on page 8, *ante*. The majority opinion violates the Erie rule on this also in using "weight of authority". The Trial Court sat as an Iowa Court and there are no decisions of a higher Iowa court.

II.

The Majority Opinion Is in Conflict with Opinions in the Sixth and Second Circuits, and the Federal Cases Cited, Ante.

In the case that came up from Tennessee in the Sixth, the insuring clause at one place said the insurance was not effective until a policy was issued, but at another it could have been construed to lead the applicant to believe it was effective at once. In the receipt at bar there was no mention that it was not effective until a policy was issued, but the insuring clause states it is, "effective as of this date," etc. Charging a premium during the interim would lead Hinkle to believe he was getting what he paid for. If Hinkle believed he was in good health, he had a right to believe he had immediate insurance, whereas in the Tennessee contract the insured had some notice that maybe he did not have insurance until he got a policy. But the Sixth Circuit held that even with this notice, the insurance company was liable unless they notified him before his death that he was not insurable. That means that if he went to his death believing he had insurance, they are estopped to claim otherwise after it is too late for him to protect himself. They held the insurance company to a strict compliance with the contract the way they printed it.

The Iowa cases on estoppel are the same or stronger than those of Tennessee, although there are no Iowa cases on all fours with this receipt that mention estoppel. But the general law of estoppel is, if you cause a man to believe or rely on any fact until it is too late for him to protect himself, you are estopped from claiming that such fact does not exist. An extreme example of how far Iowa uses estoppel in its decisions is *Miller* v. *Lawlor*, 245 Iowa

1144, 66 N. W. 2d 267, decided in 1954. The dissenting opinion, as well as plaintiff's pleadings shown from pages 23 to 28 of the printed Record, called attention to estoppel; but the majority opinion refused to apply that part of the Iowa decision, as the Sixth Circuit did.

It is no answer to the above that the Reynolds case did not mention estoppel. No estoppel was claimed there. Plaintiffs herein pleaded estopped in one form or another from pages 21 to 28, Transcript of Record, and on page 24 thereof plaintiffs pleaded:

> "* * * and they printed on said receipt that the insurance was then in force, 'irrespective of any subsequent casualty', they thus lead Max Hinkle into the belief that he was covered by insurance and they caused him to continue under such belief and lured him into a sense of security until his death and until it was too late for him to protect himself." (R. p. 24).

The dissenting opinion herein held the same as the Sixth Circuit. We submit that the majority opinion has refused to follow the Iowa decisions on estoppel.

We further submit that under present conditions, unless the situation throughout the United States is corrected by certiorari herein, whether one can recover on these interim contracts depends upon which Circuit the appeal falls in, pointed out in our statement of the Questions Presented on pages 10 and 11 *ante*.

The Federal rule should be as stated on pages 10 and 11 herein *ante*.

The Federal rule should also be that Courts of Appeals can not re-write the contracts more favorable to the companies, or give them a technical interpretation which only an insurance lawyer would arrive at, but the Federal rule should be as stated by Judge Hand in 160 F. 2d at page 601,

> "an underwriter might so understand the phrase, when read in its context, but the application was not to be submitted to underwriters; it was to go to persons utterly unacquainted with the niceties of life insurance, who would read it colloquially. It is the understanding of such persons that counts."

But the Eight Circuit herein read the words, "rating applied for" like *they imagined* an underwriter would understand it, without even any *evidence* of what an underwriter would think, or else they re-wrote it to make it read what the insurance company now wishes it had written, instead of what it did write. To define a word differently than any dictionary defines it, is not due process. See our page 24 *ante*.

III.

Violates Plaintiffs' Rights under 5th and 7th Amendments.

The appellate court held the trial court was in error (Opinion, p. A17) for not sustaining defendant's motion for a directed verdict on a ground that was not mentioned in the motion, not assigned as error on appeal, and the opposite fact was claimed and proved by defendant's evidence, namely that defendant had determined Hinkle was not insurable. The error assigned was, the court erred in not sustaining motion for directed verdict on four stated reasons. Their motion never claimed they had determined he was not insurable, as required by the last proviso of the contract; their pleadings never claimed it, and their evidence refuted it (R. p. 48). Their only serious defense was that it was only an offer until they accepted it, and that their committee had never passed on it, and thus no acceptance. In a law action, when the appeals court goes beyond the errors assigned and reverses a trial court

on a matter that was never raised or claimed, such is not due process of law. The constitutional question was raised in petition for rehearing, and denied.

Thus on page 18 (R. 96) the majority opinion states that the evidence conclusively shows defendant made a good faith determination that because of his aviation record Hinkle was not insurable for the rating, etc., applied for, and on page 18 (R. p. 96) says the delay in the "investigation was not prejudicial to plaintiff", in the face of defendant's own evidence and pleading that the "receipt" was not a contract because never accepted, and the company had never received it at its home office (R. p. 47): The Iowa decisions cited herein hold such does constitute prejudice to any plaintiff, that commencing suit based on one excuse for non-performance and thus jeopardy of costs, is such prejudice to plaintiff as to preclude determination by a defendant of a different excuse after suit is commenced. Prejudice, however, is not necessary because making a good faith determination in the regular channels was the only way defendant could escape the terms they had themselves dictated. The quoted part of the opinion above violates the Iowa law as announced in *Reynolds, supra,* and other Iowa cases, *supra,* and in addition passes on a ground for directed verdict not mentioned in the Motion for Directed Verdict. The Motion, Paragraph 9, makes no claim of determining insurability, but only that "he was not insurable under defendant's underwriting rules". To go outside the grounds stated in the motion and hold a trial court erred in not sustaining the motion on some ground not mentioned therein, is not due process of law. A trial court does not err, if none of the grounds stated in the motion are grounds to sustain it, when he overrules it. And it is not due process of law for the appellate court to try a different law suit than the one presented.

The nearest the motion got to the ground of reversal is paragraph 3 thereof, which says "this provision requires a determination by the company of insurability, and negatives a construction of the receipt as being a contract of temporary insurance". The court had on page 11 (R. p. 87) mentioned the Reynolds case, and had held that under that case the receipt *was* a contract, and was not ambiguous. So all paragraph 3 amounted to, was a contention that there was no contract or that it was ambiguous.

There was nothing in the motion to justify the last quoted part of the opinion, and if the court had in mind paragraph 3 of the motion, the Reynolds case in Iowa had determined that point against defendant. Thus either the court abandoned the rule in the Iowa cases, or it sustained the Motion on some ground not stated therein. If it is the first, it violated the Erie Rule, if it is the second, it is not due process of law. Also on page 14 (R. pp. 92-94) the opinion states the trial court erred because it took the position good health and insurability were synonymous, in a colloquy with defendant's attorney. The only error assigned was he should have directed a verdict for four named reasons and this colloquy was not assigned as one of them. It is not due process for the appellate court to pass on errors not assigned and which were not raised by the motion that the trial court overruled, and that had no bearing upon the outcome of the law suit.

The trial court admitted in evidence over plaintiffs' objection the application defendant produced. It was still primarily blank, although Hinkle's signature appeared upon it. No copy had been delivered to Hinkle, and the Iowa Code, § 511.34, prohibits the use for any purpose of such an application by an insurance company. The purpose was to prove Hinkle misrepresented his airplane and pilot's activities. By the Iowa case cited above, such is immaterial

unless the company *determines* that the applicant is for such reason not insurable before it gives some other reason for not performing the contract, so the trial court later treated it as immaterial. Plaintiff proved, however, by two witnesses who were in the room at the time the application was taken by Bliss, circumstances which would at least leave a jury question that Bliss wrote those false answers into the application after he learned that Hinkle had been killed. The opinion holds Bliss's testimony is conclusively true. This denies plaintiff a jury trial on an issue of fact. The circumstances so completely refuted Bliss's testimony as to make it unreasonable.

Passing on matters as stated above not claimed in the pleadings or in the errors assigned, and holding defendant's evidence, if any, "conclusively" true in a law action on appeal, is not due process, and is not "by the rules of the common law", and denies a jury trial.

Further, it is not due process for an appellate court to re-write the clause containing the words, "rating applied for" or read it as if it said "premium charged by the company", or to take judicial notice that the word "rating" means the same to the ordinary man that it does to an insurance lawyer, especially in the absence of any evidence of what it means in the insurance world, or to take judicial notice that it means something other than the definition given in the dictionary. Judicial notice can be taken only of recitals in dictionaries and encyclopediae when the recital is uniform everywhere, and not open to differences of opinion but never take judicial notice of some definition *different* than that given in the dictionary. As pointed out on page 33 *ante,* the dictionary does not define "rating" the way the Court of Appeals does. Such imaginary definitions are not due process.

The opinion refused to pass on two matters argued with the inference in each that the trial court erred as to them: (1) As to whether appellant could raise for the first time after trial a question as to sufficiency of evidence that Hinkle was in good health. The court instructed the jury that there was sufficient evidence of good health. No objection was made to the instruction. Defendant's motion for directed verdict did not mention insufficiency of health evidence as a ground. Defendant's answer did not put the question of health in issue, and it did not deny plaintiff's allegation of good health, but stated merely that defendant had no knowledge of such fact. Rule 9 requires a defendant in denying a condition to have such knowledge and to plead it specifically and "with particularity". To infer the trial court erred on a matter not in issue is not due process.

(2) The opinion infers that if it were necessary the appellate court would hold that defendant could use as a defense the fact that it deliberately violated an Iowa statute, and that issuing this contract in Iowa might be a violation, although there are no Iowa cases so holding. The Iowa law is plain that one can not claim the benefit of his own wrong, if there were any wrong. The trial court determined that and no objection was made to his instructions.

We mention all of the above because it shows the attitude of the two writers of the majority opinion, which together with their refusal to let the rehearing petition go before the full bench, shows on its face that plaintiff was deprived of her judgment without due process, and that the majority procedure was not by the rules of the common law, as required by the 7th Amendment.

IV.

No Federal Jurisdiction in Foreign Corporation Removal Cases.

Any act of Congress allowing removal by a corporation of any case because it could have been *commenced* by the plaintiff in a Federal court is void as an attempt to expand the Judicial Power of the United States beyond that fixed by the Constitution.

Ever since 1844 there has existed a platitude that a foreign corporation could remove a case against a citizen of the state who elected to commence it in a state court. This platitude is based on an erroneous application of what was held in *Louisville C. & R. Co.* v. *Letson*, 2 How. 497. The reason the court gave therein as later interpreted in *Marshall* v. *B. & O. R. R. Co.*, 16 How. 314, 14 L. Ed. 953 (1853), precludes *removal* by a corporation, rather than sustains removal. A natural person in each, Marshall and Letson had sued a foreign corporation in a Federal court, and the corporation tried to defeat that right of the plaintiff to choose a Federal court. The Marshall case says right to choose his forum is "a privilege and immunity of a citizen of the United States," and held again, 1853, that although it was not a citizen of any state, and thus no diversity, a corporation could not plead its artificiality or lack of citizenship to defeat the right of a natural citizen to elect his tribunal. To do so would give a non-citizen an advantage over a citizen. There had been the fiction, resurrected again in *Muller* v. *Dows*, 94 U. S. 444, 445 (1876) (because it held a corporation was not a citizen), that all its stockholders were citizens of the state of its incorporation—a type of estoppel. To apply that same fiction to the opposite situation where the plaintiff had elected the *state* court as her tribunal and to permit the corporation

to remove the case to a court of *its* chosing, violates the very thing the court was trying to prevent; it enables the corporation to take advantage of its artificiality and non-citizenship to defeat the rights of the natural person to elect to use the *state* courts. We find no decisions since 1853 passing upon the point we raise here, removals by a corporation. Since that time however, it has been decided that a conclusive presumption is not due process; *McFarland* v. *Am. Sug. Ref. Co.*, 241 U. S. 79; fictions have been said to be "an unconstitutional assumption which no lapse of time should make us hesitate to correct"; 139 F. 2d 1003; the reasoning is "examples of Marshall's time that are not sound under modern conditions", 337 U. S. 618; and is analyzed and refuted in 56 Harvard L. R. 853, 873, 885.

The quotations and reasons stated in the opinion in *Mashall* v. *B. & O. Ry.*, in 1853 show that this court intended in both Letson and Marshall to hold that a corporation was not a citizen, and that this platitude relied on by defendant has no basis in the decisions of this court, and that there is no Federal jurisdiction for *removal* by a foreign corporation; the rule from those cases of this court is merely, a corporation can not take advantage of its artificiality to defeat the right of a citizen to elect to use the Federal court.

It would be a travesty on justice if this little woman would have to pay all this printing bill, unnecessarily large because appellant and the majority opinion wish to discuss the "weight of authority", and then get no result for these terrific costs, because defendant has tried to wear her out in a court that has no removal jurisdiction, so we do not push this too much, but we do not wish to defeat the right of the Federal government to protect itself from needless work on cases over which it has no jurisdiction, nor to protect other widows and orphans from being defeated of their rights to have their litigation decided in the state

courts where they will have to print arguments on state law only.

At the outset of the Record we signed a stipulation prepared by opposing counsel that there was Federal jurisdiction to make unnecessary printing the record of this remand motion. We do not wish to violate that agreement; but we do not wish to preclude the court from protecting itself, nor do we wish to do what Congress has no power to do, and confer jurisdiction beyond that fixed by the Constitution.

If we are wrong about the Iowa decisions pointed out herein, then the case should be remanded with direction to sustain the motion to remand to the state court, at *defendant's costs* for causing all this Federal printing; but if we are right as to the Iowa decisions, we trust the court will find a way to give us the fruits of our labors, and order the Court of Appeals to affirm the judgment of the District Court. If there is Federal jurisdiction, uniformity requires that all Circuits follow the Sixth, and be required to apply the ordinary law of estoppel of the state involved, as advocated by the dissenting opinion herein. If it was not removable, Federal common law requires defendant to pay the judgment as stated on page 21, *ante*.

We submit, that under the Iowa decisions cited herein, the trial court got the right result under the Iowa decisions, the Court of Appeals reversed on an error not raised and not in conformity with Iowa decisions, and in conflict with 6th and 2nd Circuits, denied plaintiff's right to a jury trial, violated procedural due process of law, and this Court should order the Court of Appeals to affirm the judgment of the District Court, and apply our proposition stated on page 21.

Respectfully submitted,

LELAND S. FORREST,

Attorney for Petitioners.

APPENDIX.

The following is copied from Code of Iowa, 1954:

"511.33. *Application for insurance—duty to attach to policy.* All life insurance companies or associations organized or doing business in this state under the provisions of the preceding chapters shall, upon the issue of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which by the terms of such policy are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy, or, upon reinstatement of a lapsed policy, shall attach to the renewal receipt a true copy of all representations made by the assured upon which the renewal or reinstatement is made.

"511.34. *Failure to attach — defenses — estoppel.* The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of section 511.33, it shall forever be precluded from pleading, alleging, or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 714. 28

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

VS.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 714.

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

VS.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

The Court of Appeals held that when a conditional receipt is issued for the payment in advance of a first premium for a life insurance policy and the effectiveness of the insurance is conditioned in the receipt upon the good health of the applicant and evidence of his insurability for

the plan and rating applied for, the insurer is entitled under Iowa law to a directed verdict if the applicant did not and could not meet the insurability condition set out in the conditional receipt because of his aviation pursuits.

The questions presented for review are:

1. Whether the defendant was entitled to a directed verdict under Iowa law on the grounds that the applicant failed to furnish evidence of his insurability at the date of the conditional receipt and in fact could not furnish evidence of his insurability for the plan and rating applied for because of his aviation activities, and whether the defendant was estopped from asserting this defense.

2. Whether the defendant was entitled to a directed verdict on the ground that the application and the receipt when construed together did not constitute a complete application for life insurance because of the failure to furnish evidence of good health in the absence of a medical examination and because of failure to furnish evidence of insurability, and that therefore there was no meeting of the minds of the parties sufficient to make an effective contract.

3. Whether the defendant was entitled to a directed verdict on the ground that the insertion of the words "Immediate Coverage" by the agent in the conditional receipt under the amount of insurance applied for did not vary the printed terms of the receipt, and if construed to vary said terms and effect a contract of temporary insurance, whether said contract was binding on the defendant because of the lack of authority of the agent.

4. Whether the defendant was entitled to a directed verdict on the ground that a contract of insurance for an amount in excess of $10,000 was invalid under the Iowa

statute prohibiting the issuance of such a contract without a medical examination.

5. Whether the plaintiff's rights under the 5th and 7th Amendments to the federal constitution were violated by the direction of the court to enter judgment for the defendant.

6. Whether the federal court had jurisdiction of the case on the ground of diversity of citizenship.

7. Whether the writ of certiorari in this case was improvidently granted.

STATEMENT OF THE CASE.

The "Statement of the Case" in the brief of opposing counsel is a mere statement of some of the facts. We feel constrained to make a restatement.

(1) The nature of the action.

This is an action at law on an alleged contract for temporary life insurance based upon a conditional receipt given to W. Max Hinkle, the proposed insured, for the payment of a first premium in connection with an application for a life insurance policy. A photostatic copy of this receipt is in the Record (pp. 17, 29), and it is printed in the petitioners' brief on page 13. In the interest of brevity we will not repeat it here.

The proposed insured was killed in an aeroplane accident the day after the receipt was given and before he had taken the medical examination required.

(2) The claim upon which the action is based.

The original petition, as it is denominated under Iowa practice, was in four counts. In the first two counts, the

plaintiff sued as administratrix of the proposed insured's estate, in Counts III and IV she sued in her individual capacity as beneficiary named in the application for the policy. Counts I, II and III were withdrawn from the jury, so that the only Count left in the case at the time of its submission to the jury was Count IV.

In preparing the petition, opposing counsel chose to repeat the allegations of Counts I and II in Count IV by reference only, so that it is necessary to read Counts I and II to find the substantive allegations of Count IV.

Count I (R. 2) is based on the claim that the conditional receipt in itself was a contract of temporary insurance effective immediately and that by reason of the death of W. Max Hinkle on February 26, 1955, the plaintiff as his administratrix is entitled to $10,500.00.

Count II (R. 4) repeats Count I and further alleges that the medical examination of the proposed insured was excused by his death before the time set by him and the defendant for said medical examination or it was waived by the defendant.

Count IV (R. 6) adopts by reference these two claims made by the plaintiff in her representative capacity as administratrix of the proposed insured's estate and alleges that she is entitled to recover as "the named beneficiary of the insurance."

(3) The defenses made to the claim.

The defenses to Count IV were as follows:

(1) That the conditional receipt was not a contract of temporary insurance, but a mere receipt delivered in connection with an application for life insurance, which was never completed by the proposed insured because he

failed to take the medical examination required as a part thereof (R. 8 and 9).

(2) That said receipt was conditioned upon the receipt of satisfactory evidence at the home office of the defendant in Boston that the proposed insured was insurable for the amount, plan and rating applied for; that because of the failure of the proposed insured to take a medical examination, no such satisfactory evidence has ever been received by the defendant at its Home Office in Boston and the insurance applied for never went into effect (R. 9).

(3) That if the receipt is construed, because of the insertion in the receipt of the words "Immediate Coverage", to be an agreement on the part of the defendant's agent that the insurance applied for would take effect immediately upon delivery of the receipt, said agreement was not authorized by the defendant and was not binding upon it (R. 10).

(4) That the proposed insured was not insurable for the amount, plan and rating applied for on account of his aviation record, and could not furnish satisfactory evidence that he was so insurable, and therefore the insurance applied for never went into effect (R. 11-12).

(5) That the defendant was prohibited under the laws of Iowa from issuing a policy of life insurance in the amount of $10,500 without a medical examination and the proposed insured knew that a medical examination was required, and because of the failure to take said medical examination, no complete application was ever made pursuant to which a valid policy or contract for $10,500 of life insurance could be issued under the Iowa statute (R. 12).

(4) The facts disclosed by the evidence.

Rodney Bliss, Jr., has been the general agent of the defendant in Des Moines, Iowa, for eight years. His contract with the defendant was introduced in evidence as Exhibit B (R. 36) and Section 2 thereof provides as follows (R. 37):

> LIMITATION OF AUTHORITY
>
> The General Agent is expressly forbidden to make, alter or discharge any policies, contracts or agreements on behalf of, or in the name of the Company, or to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the Company, to incur any obligations or liability for which the Company shall be responsible.

Bliss did not know W. Max Hinkle, the proposed insured, but heard that he had a mortgage on his home and was employed by G. W. Onthank Company of Des Moines. One of the policies issued by the defendant is a decreasing term policy as described in its pamphlet Exhibit C (R. 36, 38). It provides convertible decreasing term insurance for a period of 10, 15 or 20 years. The initial death benefit is $1050 per unit, and the minimum amount issued is ten units, $10,500 initial risk. On the 20 year plan, the death benefit for ten units would be $10,500 in the first year as shown by the table in Exhibit C (R. 39) and would decrease $500 per year. If premiums were payable quarterly the first quarterly premium at age 42, Hinkle's age, would be $21.70 (R. 39).

Bliss called on Hinkle at the office of the Onthank Company on February 25, 1955, after a telephone conversation in which he had explained briefly to Hinkle the coverage of the decreasing term policy and obtained Part I of application for ten units with an initial death benefit of $10,500.

Hinkle signed Part I of the application (Exhibit D, R. 19, 36) which was filled out to cover all the information Bliss had to obtain from Hinkle. Hinkle gave Bliss a check payable to the New England Mutual Life Insurance Company for $21.70, the first quarterly premium (Exhibit E, R. 36, 40). This check was never deposited in the bank. It was held by Bliss pending an investigation by a Des Moines law firm purporting to represent Mrs. Hinkle, then returned to her on May 19, 1955 (Exhibit G, R. 36, 41). It was subsequently returned to Bliss by her attorney of record in this action and was tendered to her by the answer in this case (R. 10).

When the premium was paid Bliss detached from the application the conditional receipt at the bottom of the application form (R. 34). This receipt was a printed form. It contained blanks for filling in the amount of the payment, the amount of the insurance applied for, the name of the proposed insured, the date and the signature of the agent. Said receipt was introduced in evidence as Exhibit 1 (R. 17). Bliss filled in the amount paid "Twenty one and 70/100", the amount applied for, "$10,500.00", the name of the proposed insured (W. Max Hinkle), the date and his own signature and wrote under the figures "$10,500.00" the words "Immediate Coverage". He testified that he explained to Hinkle that this was meant to give the amount of the initial death benefit. Without some such qualification the receipt would indicate that the insurance would always be in the face amount of $10,500 whereas under this policy the amount was reduced $500 every year. It was explained to Hinkle that as the mortgage on his home was gradually reduced by partial payments, the amount of insurance would also be gradually reduced (R. 35, 32-33).

Part I of the application was not completed at the time with the form and amount of insurance. Those items had

been orally agreed upon, and Bliss testified that he asked Hinkle all the questions to which answers appear on the application and wrote them down in Hinkle's presence before Hinkle signed the application. He said that Hinkle answered "no" to the aviation question 17-a "Does the proposed insured plan to make flights as a trainee, pilot or crew member or has he made such flights within 10 years?" (R. 33.) Mrs. Hansen, a clerk in the same office, said that she did not hear Bliss ask Hinkle this question but she was busy at her own work and paid no particular attention to the conversation until Bliss picked up the telephone to call Dr. Posner (R. 29-30). She and Robert Evans who was in and out of the office while Bliss was there testified that it was common knowledge at the office that Hinkle had been flying as a pilot for years (R. 52-53). Bliss testified that he knew nothing whatever about Hinkle's aviation activities (R. 34).

After the application had been signed and the receipt delivered Bliss asked Hinkle when he could take the medical examination and Hinkle said "today". Bliss then telephoned Dr. E. R. Posner, the medical examiner of the company at Des Moines, for an appointment (R. 34). There is some conflict in the evidence as to the exact time the conversation took place. Mrs. Hansen, the clerk referred to, testified it was after lunch. Bliss said it was between 11 and 11:30 A. M. Bliss testified that he made an appointment with Dr. Posner for Hinkle at 11:45 that morning, that just as he was hanging up the phone Hinkle told him he was too busy and the appointment was made for 11:30 the following Monday (R. 34). This was verified by Dr. Posner in his testimony (R. 31). Mrs. Hansen, who was in Hinkle's office, testified that she heard Bliss tell Hinkle that the doctor could not see him that day and that the appointment was then made for Monday morning (R. 29).

Hinkle was killed while flying his plane which crashed near Des Moines the following day, Saturday.

The plaintiff, Mrs. Hinkle, testified that when she got up that Saturday morning her husband had gone and she found the conditional receipt on the kitchen table. Hinkle had planned to fly to Omaha that morning (R. 29).

Under the underwriting rules and practices of the defendant, if a proposed insured was a pilot, he was asked to fill out an Aviation Questionnaire (R. 47) and the application Exhibit D, states at the bottom of its aviation section No. 17, after the questions with regard to aviation: "If answer to A, B or C is yes, complete Aviation Questionnaire" (R. 19). The aviation questionnaire in use by the defendant was introduced in evidence as Exhibit H (R. 36, 42). It states at the top that it must be submitted if the proposed insured plans to make flights as a trainee, pilot or crew member or has made such flights within ten years. It contains a detailed list of questions showing the flying record, license, ownership of aircraft, etc. It contains the following instruction at the bottom:

> "Notice to Agent: If insurance with aviation coverage cannot be issued at standard rates, is
>
> ( ) full coverage with extra premium, or
>
> ( ) standard rate with aviation exclusion desired?"

In case of a pilot, if the proposed insured desired a full coverage with extra premium, he would be required to pay $3.75 extra premium for each $1000 of insurance (R. 47). If he desired the standard rate with aviation exclusion, he was required to sign an amendment limiting aviation coverage. The form of amendment was introduced in evidence as Exhibit I (R. 36, 44). It provides in substance that if the

death of the insured results from travel or flight or descent from or with any kind of aircraft of which the insured is acting as a pilot, the liability of the Company under the policy shall be limited to the premiums paid, less dividends, or the reserve whichever is greater. There is a place at the bottom for the signature of the proposed insured, to be witnessed by the agent.

Hinkle's aviation record was stipulated and shows that he had had a pilot's license from the Civil Aeronautics Administration since November, 1946, that he owned four aeroplanes in partnership with others; that he piloted a plane from the municipal airport in Des Moines every Sunday when weather permitted, that when he applied for a pilot's license in December, 1954, he reported total flying time of 1450 hours as a pilot, 43 of which occurred during the last six months of 1954 (R. 49-50).

Under the underwriting rules and practices of the defendant, if this record had been disclosed in the aviation questionnaire, Hinkle would have been given his choice to pay an extra premium for full coverage or to have the amendment limiting coverage attached to his policy. He was not insurable on the plan and for the rating applied for. If he had taken the medical examination, a report would have been obtained from the Retail Credit Company, which would have covered his aviation record and the policy would not have been issued as applied for (R. 47).

The only evidence as to the good health of the proposed insured was that he passed an examination for a pilot's license on December, 1954 (R. 50). There was no evidence as to the qualifications for such a license, and no medical and no lay testimony as to the proposed insured's state of health on February 25, 1955.

Part I of the application, Exhibit D, was never forwarded to the home office of the defendant (R. 47).

After Hinkle's death Bliss told the plaintiff that the defendant would not pay her because there had been no physical examination (R. 29).

A subsequent investigation was made by a firm of lawyers in Des Moines on behalf of Mrs. Hinkle and Bliss sent them the application (R. 40). It was subsequently returned to Bliss and the check was returned to Mrs. Hinkle (R. 41). Another lawyer was later retained and this suit was commenced.

We do not want to abuse the patience of the Court by going through the petitioner's brief and pointing out each misstatement of the record. We do, however, want to call the Court's attention to two important misstatements. The petition for certiorari refers to what opposing counsel seems to consider an estoppel from asserting that the receipt did not constitute a temporary contract of insurance, and he says: "Plaintiff did plead estoppel here." Statements to the same general effect are repeated again and again in the brief of opposing counsel. There is no mention of estoppel in the petition in the state court. The plaintiff filed a reply in which estoppel is pleaded four times. The first is in Division III (R. 22), where the plaintiff claimed that the defendant was estopped from pleading the agent's lack of authority to bind the company by a contract of temporary insurance. This question was not considered by the Court of Appeals in view of its holding as to insurability as stated in its opinion. The second plea of estoppel is in Division IV (R. 23) where the plaintiff alleges that the defendant is estopped under Section 511.34 of the Iowa code from proving the application for the policy because no copy was given to the applicant. The Iowa statute relates only to actions on a policy when issued and as no policy was issued here the statute does not apply. The third plea in Division V (R. 24-27) is that the

defendant is estopped from pleading that the alleged contract of insurance was invalid under Sec. 508.28 of the Iowa Code prohibiting a life insurance company from issuing a policy in excess of $10,000 without a medical examination. The Court of Appeals held that the defense under this statute raised an unsettled question of Iowa law upon which it was deemed unnecessary and hence inadvisable to express an opinion. The fourth plea is in Division VI (R. 27) which is a repetition of the second plea referred to above. We can find no pleading asserting that the defendant was estopped from asserting the invalidity of the receipt as a contract of temporary insurance because the proposed insured was not insurable for the plan and rating applied for.

The other important misstatement is that the Vice-President of the defendant "testified that Hinkle was insurable for every plan they had and for any amount they had". The actual testimony is as follows:

> "If Mr. Hinkle's aviation record had been disclosed in the aviation questionnaire a policy would not have been issued without any extra rating or without the limited aviation coverage." (R. 47).
>
> "If a man owns an aeroplane and answers the questions regarding aviation in Exhibit D in the affirmative, he would be *eligible* for every plan of insurance we have with either an aviation exclusion rider or it would cost him a little more money." (R. 48) (Emphasis ours).

(5) The issues actually tried in the District Court and how they were decided.

At the close of the evidence the defendant made a motion for directed verdict on several grounds and it was overruled. The opinion of the Court of Appeals does not

refer by number to the grounds on which the defendant was entitled to have that motion sustained, but it is obvious from the record that they were contained in the second, third, eighth and ninth paragraphs of the motion which are as follows:

> "2. The said conditional receipt was conditioned upon the receipt of satisfactory evidence at the home office in Boston that the proposed insured was insurable for the amount, plan and rating applied for. It appears from the record that no such evidence was sent to the home office of the defendant at Boston or received by it there, and in fact, no such evidence could have been furnished by the proposed insured in view of his aviation record.
>
> "3. The conditional receipt contemplated and expressly provided in the third clause of the printed matter therein 'If the company determines that the proposed insured is not so insurable, said application shall be declined and the amount paid will be refunded upon return of this receipt.' This provision requires and contemplates a determination by the company as to the insurability of the proposed insured for the amount, plan and rating applied for, and, provided that, if the company determines that the proposed insured is not so insurable, the application will be declined; that this provision negatives the construction of the receipt as being in itself a contract for temporary insurance.
>
> "8. It appears from the evidence that the proposed insured was informed that a medical examination was necessary in connection with his application for life insurance. His failure to take said medical examination, as shown by the record, was not due to any act or neglect on the part of defendant, and there is no evidence that said medical examination was waived by the defendant.

"9. It appears from the evidence that because of the proposed insured's aviation record, he was not insurable for the plan and rating applied for under the defendant's underwriting rules and practices. Regardless of whether the answer to Question 17(a) in the application was written by the agent before or after the proposed insured signed the application, if he had answered 'yes' to said question, he was not insurable for the plan and rating applied for."

The remaining grounds of the motion, which were not discussed in the Court of Appeals "for the reason that what has heretofore been said compels a reversal", (R. 96) will be stated and discussed in Divisions II, III and IV of this brief, and are therefore not printed again here in the interest of brevity.

After the motion to direct a verdict was overruled, the district judge instructed the jury that there was only one issue in the case, namely, whether the proposed insured was in good health on the date of the receipt; that if he was in good health, the conditional receipt created a contract of temporary insurance which remained in force until the defendant acted upon the application, and although defendant had not acted on the application, the contract of temporary insurance was in force on the date following the application, when the proposed insured was killed (R. 63, 64). Counts I, II and III were withdrawn from the jury (R. 54).

On this issue the jury returned a verdict for the plaintiff Maxine K. Hinkle, in her individual capacity as beneficiary named in the application, for $10,500, the full amount of the insurance applied for and judgment was entered thereon (R. 70-71).

The defendant then made a motion to set aside the verdict and judgment in favor of the plaintiff and to enter

judgment in its favor notwithstanding the verdict and it embodied in this motion the identical grounds stated in the motion to direct a verdict (R. 71). This motion was overruled and the appeal followed.

(6) The decision of the Court of Appeals.

The Court of Appeals in its decision pointed out that the receipt contained two provisos, the first pertaining to good health and the second to insurability, and held that the trial court erred in taking the position that good health and insurability are practically synonymous. It held that Iowa law controlled and followed the decision in *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N.W. 207, to the effect that under a receipt conditioned on insurability, said insurability was by the contract made the test of the company's liability (R. 87). It found that the evidence conclusively showed that Hinkle on account of his aviation activities was not insurable for the plan and rating applied for (R. 96). It expressed the belief that the Iowa court would not find the receipt ambiguous (R. 91), (although no question of ambiguity had been raised by the pleadings). It therefore held "that the defendant was legally entitled to have its motion for directed verdict sustained upor the basis that the insurance was not in effect at the time of the applicant's death for the reason that the applicant did not, and could not, meet the insurability condition set out in the conditional receipt because of his aviation pursuits." (R. 96).

The court went on to say:

> "Other issues argued by the parties have been considered but do not warrant discussion for the reason that what has heretofore been said compels a reversal."

For that reason it made no mention of the first paragraph of the motion for directed verdict (R. 55) to the

effect that there was no complete application because there was no medical examination, and hence no meeting of minds. With respect to the second and third paragraphs of the motion relating to the insertion of the words "Immediate Coverage" under the amount of insurance applied for in the receipt (R. 55, 56), the Court of Appeals agreed with the district judge (R. 66) that the addition of these words added nothing to the receipt because if the conditions of the receipt had been complied with the insurance would have taken effect immediately, and with this construction of the receipt as a whole "we do not reach the serious question of the authority of the agent Bliss to alter the receipt or to agree to immediate unconditional coverage." (R. 90, 91). With respect to paragraphs 6 and 7 of the motion (R. 56, 57) which should be read together and which relate to the Iowa statute prohibiting insurance in excess of $10,000 without a medical examination, the court said that this raised "an unsettled question of Iowa law upon which we deem it unnecessary and hence inadvisable to express an opinion." (R. 91-92).

No constitutional questions and no jurisdictional questions were presented to the Court of Appeals on the original submission and hence there is no mention of them in the opinion except for the brief statement that: "Jurisdiction based upon diversity of citizenship is established" (R. 82).

SUMMARY OF THE ARGUMENT.

1. The purpose of a conditional receipt for the payment of a first premium in connection with an application for life insurance conditioned upon the insurability of the applicant is to protect him against subsequent change of health or unforeseen casualty before the policy is actually

delivered, *if he was in fact insurable at the date of the receipt.* It is not to give him temporary insurance if he is not insurable. Under the law of Iowa as announced by its Supreme Court in *Reynolds* v. *Northwestern Mutual,* 189 Iowa 76, 176 N.W. 207, the conditional receipt in the case at bar did not create a contract of temporary insurance because the applicant did not furnish evidence that he was insurable for the plan and rating applied for and for the further reason that he could not furnish such evidence. Iowa decisions relating to estoppel and the so-called "mending his hold" doctrine are not applicable as no estoppel was pleaded by the plaintiff to the defense that there was no contract because the applicant was not insurable and could not furnish proof of his insurability by reason of his aviation activities. The Court of Appeals, in an opinion written by a Judge who is a resident of Iowa and served for many years as a District Judge there, followed the law of Iowa and its determination of that law should be followed by this Court. The decision is not in conflict with the decisions in *Gaunt* v. *John Hancock Mutual,* (2nd Cir.) 160 F.2d 599, and *Liberty National Life* v. *Hamilton,* (6th Cir.) 237 F.2d 235, because of the differences between the provisions of the various receipts and because the last named cases were decided under the laws of Connecticut and Tennessee respectively and not under the law of Iowa. The defendant was entitled to a directed verdict on the grounds stated in Paragraphs 2, 3, 8 and 9 of its motion, and the Court of Appeals decision in favor of the defendant should be affirmed.

2. Even if the Court of Appeals erred in the reason for its decision as stated in the opinion, the defendant was entitled to a directed verdict under the ground stated in Paragraph 1 of its motion because the conditional receipt was only a part of a transaction consisting of an applica-

tion for life insurance and no complete application was ever made because the applicant never had a medical examination and did not furnish evidence of his insurability. There was therefore no acceptance of the offer contained in his application and no meeting of the minds sufficient to make a contract.

3. Even if the Court of Appeals erred in the reason for its decision as stated in the opinion, the defendant was entitled to a directed verdict on the ground stated in Paragraph 5 of its motion because the addition of the words "Immediate Coverage" by the agent under the amount of insurance applied for in the receipt did not alter the printed provisions of the receipt or waive the two provisos contained therein. If it should be construed to have this effect, no valid contract of insurance was effective because the agent had no authority to make contracts for the defendant.

4. Even if the Court of Appeals erred in the reason for its decision, the defendant was entitled to a directed verdict on the ground stated in Paragraph 6 of its motion because a contract of life insurance in excess of $10,000 is not permitted by Sec. 508.28 of the Code of Iowa, 1954, without a medical examination and any alleged contract in excess of that sum without such an examination is invalid.

5. The rights of the plaintiff under the 5th and 7th Amendments were not violated by the direction to enter judgment for the defendant.

6. The federal court had jurisdiction of this suit because of the amount involved and the diversity of citizenship between the plaintiff in her dual capacity, a citizen of Iowa, and the defendant, a corporation organized under the laws of Massachusetts and a citizen of that state.

7. In view of the issues as now developed by the briefs of counsel, it appears that the writ of certiorari should not have been granted as this is not a case of public importance but a mere attempt to use this court as a further court of appeal by a defeated party and there is no conflict between circuits.

ARGUMENT.

Division I.

Under the law of Iowa which governs the conditional receipt no temporary contract of insurance became effective because no evidence of insurability for the plan and rating applied for was ever furnished to the defendant, and for the further reason that the proposed insured could not furnish satisfactory evidence of such insurability on account of his aviation record.

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a. The nature and purpose of a conditional receipt for the payment of the first premium on a life insurance policy in advance.

The subject of temporary life, accident or health insurance is exhaustively treated in a note in 2 A.L.R. 2d 943. The note writer refers throughout to receipts given for the first premium as "binding receipts," but we submit that this is a misnomer and that they should be referred to as conditional receipts because they all, with the exception of one class hereinafter mentioned, are based upon conditions. The receipt in the case at bar is entitled in large print "CONDITIONAL RECEIPT." The

note writer divides receipts of this kind into four categories listed in the opinion of the Court of Appeals (R. 88-9). The second of these categories reads as follows:

> "(2) Another type of receipt provides that the insurance shall be effective as of the date of the medical examination, if the company shall be satisfied that on that date the applicant was an insurable risk and that the application was otherwise acceptable under the company's regulations for the amount and plan of the policy applied for. In some instances the date of the application is taken instead of the date of the medical examination."

The receipt in the case at bar falls within this category as noted by the Court of Appeals.

The note writer omits a fifth category: an absolute unconditional binding receipt. In an article by W. L. Wilkinson published in 1949 Proceedings of Legal Section of the American Life Convention, page 37, he refers to receipts which are unconditional binders. He writes that such receipts are used by only two companies, one in the United States and one in Canada, and he quotes these forms of receipt as showing what constitutes an unconditional receipt which can really be described as a binding receipt and which immediately creates a contract of temporary insurance. The one used by the American company says:

> "If said sum is sufficient to pay in full a first premium in accordance with the published rates of the company on the date hereof for the policy as applied for, the company will be liable from and after said payment to the same extent as if the policy, as applied for, had been issued and delivered at that time; provided, however, that (1) the company reserves the absolute right to reject said application and if said application be rejected (and without notice thereof) all liability on the part of the company shall thereupon and forth-

with cease and terminate automatically except as to claims maturing before such rejection; and (2) if said application be neither approved nor rejected by the company at its home office within forty-five (45) days from the date of said application it shall be deemed to have been rejected as of the last day of such forty-five (45) day period, without notice to that effect."

A mere glance at this receipt shows the vital difference between it and a conditional receipt. Under it, the temporary insurance becomes immediately effective without any condition. The receipt in the case at bar was headed in bold face type by the words "Conditional Receipt". The same sentence providing that the insurance applied for should be in full force from date contained two express provisos: First, that the proposed insured be in good health; and second, that satisfactory evidence of his insurability for the amount, plan and rating applied for be received at the home office of the company in Boston. It contemplates that the proposed insured may not be able to furnish satisfactory evidence of his insurability and provides that in that event the application will be declined and the advance premium refunded.

The District Judge himself did not treat the receipt as an unconditional binder. He recognized the validity of the first proviso relating to the good health of the proposed insured and told the jury that if that proviso was fulfilled, the insurance became immediately effective (R. 63). We confess that we cannot understand his reasoning. If he considered the receipt an unconditional binder, then both the provisos were ineffectual to prevent the temporary insurance from going into effect at once. But if the first proviso was a valid condition, under what process of reasoning or rule of grammar can the second proviso be completely ignored? It was just as valid and effective as the first one. There was no repugnancy or ambiguity in the

receipt. The proposed insured knew that he had to have a medical examination; he knew from the language of the receipt that the application might be declined, in which case the premium would be returned. He was bound to know that his application was not complete and would not be complete until he took the medical examination and he was bound to know that the insurance would not take effect from date unless both provisos in the receipt were complied with: namely good health and evidence of insurability.

It is important at this point to correct a misconception of the purpose and effect of a conditional receipt which appears in a few judicial opinions. It is suggested there that such a receipt is a trap for the unwary applicant who believes that he has temporary coverage when in fact the insurer intends not to cover him. Nothing could be further from the truth.

If the applicant pays the premium in advance and gets a receipt conditioned upon insurability, and if he is insurable, the insurance becomes effective from the date of the application. If his death occurs before the policy is issued or if his health changes, the insurance is nevertheless in force. The receipt in the case at bar does not require that the evidence of insurability be received at the home office during the lifetime of the applicant or while he is still in good health. Let us take two supposititious cases. Let us assume that Mr. Hinkle had taken and passed a satisfactory medical examination, and that he had had no aviation record, and that he was otherwise insurable. If he had been killed on the day after the application, the claim would have been paid even though the papers did not arrive in Boston until after his death. Let us then assume the same facts but instead of his death, let us assume an unsuspected heart attack, the day after the examination, but that he survived the attack although his health was severely impaired.

Then again the policy would have been issued and would have been in force in spite of his change in health and even though he was uninsurable because of that change of health when the policy was actually issued.

The point to be emphasized is that the purpose of such a conditional receipt is to protect the applicant who is insurable, during the necessary lapse of time between the date of his application and medical examination and the actual issuance of the policy. It is not to protect or give temporary coverage to an applicant who is not insurable for the plan and rating applied for. In that event the advance premium is refunded.

The following cases are of interest as bearing upon the nature and effect of a conditional receipt and the meaning it should have to the applicant: *Northwestern Mutual* v. *Neafus*, 145 Ky. 563, 140 S.W. 1026; *Maddox* v. *Life & Casualty Co.*, 79 Ga. App. 164, 53 S.E.2d 235 and *Mutual Benefit* v. *Edwards*, 174 Okla. 210, 50 P.2d 144. To quote from the Neafus case, where the receipt was conditioned upon the approval of the application: "There is nothing unfair or unreasonable or oppressive in the conditions of this receipt."

If the receipt in the case at bar is construed to create in itself a temporary contract of insurance, the defendant insured a risk without ever having the opportunity to accept or reject it. In fact so far as its home office was concerned it had no knowledge that a partial application had been made. We believe it violates every principle of life insurance law to hold that an agent can bind a life insurance company to an unlimited risk without a medical examination or without any opportunity whatever for the officers of the company to pass upon the insurability of the applicant. The only exception to this rule arises when

the company is willing to issue an unconditional *binding* receipt of the kind which we have mentioned above.

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b. Under the law of Iowa the test of the insurer's liability under a receipt conditioned upon insurability is the insurability of the applicant on the date of the application for the plan and rating applied for.

The validity of the alleged contract of temporary insurance will have to be determined by the law of Iowa and it so happens that one of the leading cases is an Iowa case, *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N.W. 207. It is the only case in the Iowa Supreme Court involving this kind of a receipt. In that case the applicant signed an application for a life insurance policy, paid the first premium, received a receipt therefor and took the medical examination all on the same day, December 5. The application provided in Section (2) thereof that if the premium was paid in advance, "the insurance (subject to the provisions of the said company's regular form of policy for the plan applied for) shall be effective from the date of the medical examination therefor and such a policy will be issued and delivered to me or my legal representatives provided the said company in its judgment shall be satisfied as to my insurability on the plan applied for on the date of such medical examination; and (3) that if said company shall not be so satisfied the amount of the premium paid shall be returned."

The receipt acknowledged receipt of the first quarterly premium on the policy applied for: "the said payment being made by him subject to the terms and conditions of agreements (2) and (3) contained in his said application."

While the language is not identical the legal effect of (2) above is the same as that of the second proviso in the receipt in the case at bar. It is a receipt conditioned upon insurability. The report of the medical examiner in the *Reynolds* case was satisfactory and the application and report arrived at the Company's home office on December 7th. On the morning of December 8th the applicant died suddenly, and after his death the application was rejected on the ground that he was not insurable. The court held that preliminary contracts of insurance were sustained by the courts and were it not for the proviso such a contract would have been effective. Because of the proviso and the fact disclosed after the applicant's death that he was not insurable, the court held that no temporary insurance ever became effective. The opinion quotes the clause in the application quoted above down to the word "provided" and then goes on to say:

> "Construed independent of what follows, the clause just quoted makes the insurance effective from the date of the medical examination therefor and sustains appellant's construction. The contract must however be construed as a whole and effect given to the following provision thereof.
>
> 'Provided the said company in its judgment shall be satisfied as to my insurability, on the plan applied for, on the date of such medical examination.'
>
> "Counsel for appellant arrives at his conclusion by treating this clause as a limitation upon the following language only, 'and such a policy shall be issued and delivered to me or my legal representatives:' that is, he contends that the insurance, becoming effective upon the date of the medical examination, continues in full force until the application is rejected by the company.
>
> "There can be no question under the form of contract in question, that, if the insurance applied for ever

becomes effective, it is as of the date of the medical examination. This is true if the application is accepted and a policy issued. That the contract contemplates that liability of the company will attach before the issuance of a policy is clearly indicated by the parenthetical clause of the contract which makes the insurance subject to the provisions of the company's regular form of policy applied for. The receipt, signed by the company's agent and delivered to the applicant, for $13.19, recites that this sum is the amount of the first quarterly premium on such policy. The quarter for which the premium was paid commenced on the date of the medical examination, because that was the date upon which the insurance would have commenced, if a policy had issued."

* * *

"We have no doubt that the proviso in the contract relates to all of Clause 2 that precedes it; but it is our conclusion that the contract became binding, and the insurance effective, on the date of the medical examination, subject, however, to the provisions of the company's regular form of policy for the plan applied for, and the insurability of the applicant on the date of such medical examination. *The insurability of the applicant on the date of the medical examination is, by the contract, made the test of the company's liability.*" (Emphasis ours).

This case, which is the law of Iowa, is absolutely decisive of the case at bar. It is stronger than the case at bar because there was an actual medical examination which was satisfactory. We have examined the original abstract of the record on appeal in the office of the Clerk of the Supreme Court of Iowa and the report of the medical examiner contains this question and his answer thereto:

Q. "Do you unqualifiedly recommend the acceptance of this risk for a life policy?"

"I do."

It was only after the applicant's death that the company asked for further information about his previous illness, and when it learned of his death, no further investigation was made. The proofs of death showed pre-existing disease and were introduced in evidence. In the case at bar there was no medical examination, consequently no complete application and no notice given to the defendant of the execution of the receipt and Part I of the application until after the applicant's death. Said Part I was never received in Boston. After an investigation by attorneys for the plaintiff, the defendant's agent returned the check given for the premium, which had never been cashed. The evidence shows not only that the proposed insured failed to furnish any evidence of his good health by passing the medical examination as required but it also shows that he could never have furnished truthful evidence of his insurability because of his aviation record.

The Reynolds case has been cited by many other courts and appears in all the literature relating to conditional receipts. It squarely holds that the temporary insurance is conditioned upon the provisos contained in the receipt and unless these provisos are complied with, no insurance ever becomes effective.

The gist of the petitioner's argument is that the Court of Appeals did not follow the law of Iowa as required by *Erie Railway* v. *Tompkins*, 304 U.S. 64. The gist of our argument is that the Court of Appeals did follow the law of Iowa as laid down in *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N.W. 207. As we pointed out above, the receipt in the Reynolds case was conditioned upon insurability and the essence of the decision is contained in this statement by the Court:

> "The insurability of the applicant on the date of the medical examination is by the contract made the test of the Company's liability."

In that case the insurance was to take effect on the date of the medical examination; in the case at bar it was to take effect on the date of the receipt. This makes no difference in the result obtained.

Counsel asserts that the Court of Appeals ignored Iowa decisions that the receipt "was a contract until a policy was rejected". The only Iowa case he could be referring to is the Reynolds case, and his contention is exactly the same contention which the plaintiff made in the Reynolds case as stated by the Iowa Court in its opinion in these words, referring to counsel for the plaintiff:

> "that is, he contends that the insurance, becoming effective upon the date of the medical examination, continues in full force until the application is rejected by the company."

If we can read the English language, it is clear to us that the Reynolds case squarely decided that this contention was unsound. One would think from the conclusions which counsel draws that this case was decided in favor of the plaintiff. On the contrary the Court held that the defendant was entitled to a directed verdict.

On page 4 of his brief, opposing counsel purports to state the law of Iowa as laid down in the Reynolds case. This is not a quotation from the case although at first glance it appears to be. There is absolutely nothing in the Reynolds case about a defeasance clause. The phrase "defeasance clause" is not used in the opinion. We are not relying on any defeasance clause in the receipt. We are relying on the second proviso in the receipt requiring evidence of insurability. The proviso has not been complied with, and under the rule in the Reynolds case no temporary insurance ever became effective. The other Iowa cases cited do not deal with conditional receipts and have

no application to the case at bar for reasons which will be pointed out later in this brief.

The important point about the case at bar is the fact that no proof of either good health or insurability was ever furnished the defendant. It takes some temerity to say that there is no case in the courts upholding a specific rule of law. In the recesses of the New York Supplement or the officially unreported opinions of intermediate appellate courts, cases can sometimes be unearthed which will dispute any categorical statement. However, we have made an extensive and careful search of the authorities including all those that we can find in which temporary contracts of insurance have been upheld. *We can find no case holding that a receipt conditioned upon insurability constitutes a temporary contract of insurance when in fact the applicant is not insurable for the plan and rating applied for.* The diligence of opposing counsel has only resulted in the citation of two decisions which he claims support his position: *Gaunt* v. *John Hancock*, 160 F.2d 599 and *Liberty National Life* v. *Hamilton*, 237 F.2d 235. The receipts in those cases are quite different from that involved in the case at bar but in both of them the applicant was found to be insurable. The cases are discussed and analyzed in subdivision f of this Division of our brief.

It is well to note here again that the two provisos in the receipt referred to two different things; first, good health; second, evidence of insurability. The latter term is broader than the first as held by the Court of Appeals, citing a number of cases which need not be repeated here. Counsel complains of this holding because it was based on the weight of authority without any Iowa cases. As pointed out below this holding was not the basis for the reversal. It was merely an explanation for the holding of the trial court that the second proviso in the

receipt added nothing to the first. The Court of Appeals held that the defendant had a right to consider factors other than good health, as for instance aviation activity, in determining insurability. It is clear that in the absence of an Iowa decision the court had a right to determine the general law on the subject as held by this court in *King* v. *United Commercial Travelers*, 333 U.S. 153, 92 L. Ed. 608, and many other cases. And as pointed out by Justice Stone in *Meredith* v. *Winter Haven*, 320 U.S. 228, 88 L. Ed. 9, if the highest court of the state has not answered a question of state law and the character of the answers which it might ultimately give remains uncertain, the federal courts will not hesitate to decide them in diversity cases.

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c. No contract of temporary insurance ever took effect for the reason that the second proviso in the conditional receipt relating to insurability never could have been complied with, because the proposed insured's aviation record made him uninsurable for the plan and rating applied for.

Under the conditional receipt the taking effect of the insurance was conditioned upon the furnishing of satisfactory evidence to the defendant's home office in Boston that the proposed insured was insurable for the amount, plan and rating applied for. Although he never completed the application by executing Part II and taking the medical examination, he did make certain representations in Part I. Question 17A is: "Does the Proposed Insured plan to make flights as a trainee, pilot or crew member or has he made such flights within 10 years." His answer was "No".

(R. 19). He was killed the next day in a crash while piloting his own plane (R. 50).

It is clear from the record that if true answers had been given as to his flying record the policy would not have been issued for the plan and rating applied for. The defendant would have offered him a policy with an aviation exclusion rider under which it would have only been liable for the first premium if the applicant had been killed during the first year while flying his own plane. This would not have been a policy on the plan applied for as the policy applied for contemplated no limitation of liability on account of aviation. In the alternative the defendant would have offered him full coverage by the payment of an extra premium of $3.75 per $1,000. This would not have been a policy for the rating applied for (R. 47).

However, the true facts in regard to the aviation record of the proposed insured were not given in the application. If he had passed a satisfactory medical examination these true facts would undoubtedly have been discovered by the Retail Credit Company and would have resulted in an aviation questionnaire and the procedure would have been followed as set forth in the preceding paragraph. And even if the true facts had not been discovered at the time and if the policy had been issued and delivered to the proposed insured during his lifetime it could have been rescinded by the defendant during the contestable period by reason of the misrepresentations as to the aviation record contained in the application.

The case of *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N.W. 207, which we have referred to at length in the preceding division of this argument is also a case on which we rely in support of the point stated at the head of this division. It is the law of Iowa and it is decisive of the

case at bar. It is supported by cases from other jurisdictions.

Warren v. *New York Life,* (5th Cir.) 128 F.2d 671, involved facts almost identical with those in the case at bar. The premium was paid in advance. The application and the receipt made the effective date of the policy the date of the application, if the company after medical examination and investigation was satisfied that the applicant was on that date insurable on the plan and at the company's published premium rate corresponding to his age, whether the policy was delivered or not. In his application he stated that he had never flown, although he had been a passenger within the past month. He repeated this misstatement in his answers to the medical examiner in Part II of the application and gave the further answer "No" to the question: "Do you contemplate participation in aeronautics?" Immediately after he took the examination he went to the municipal airport, signed for a training course in aviation to obtain a license as a private pilot and flew for thirty minutes. During the next 13 days he flew five more times. The application was sent to the home office and a policy was issued and sent to the local office for delivery, but before it was delivered the company was informed that the applicant was taking flying lessons. It promptly ordered that the policy be returned, and sent the agent a notice of suspension which included the sentence "Kindly have aviation blank completed." The agent notified the applicant and delivered the notice of suspension. He gave him an aviation questionnaire and a copy of the aviation clause limiting liability for death when operating any kind of aircraft except as a fare paying passenger. This questionnaire and aviation clause was similar to the questionnaire and aviation amendment identified as Exhibits H and I in the case at bar. The applicant never filled out the ques-

tionnaire and was killed in an automobile accident about ten days later. It will be noted that in this case the policy had actually been issued, so it is obvious that the medical examination was satisfactory. Suit was commenced on the application and in the alternative for damages, but the court held that there was no contract and there could be no recovery on the application. The court said:

> "Certain it is that the policy of insurance was not in force and effect. It had not been delivered. It had been recalled by the home office from the branch office in Shreveport and the applicant had been informed and had been given written notice that his application had been suspended pending completion of the aviation questionnaire and approval of the aviation endorsement. The applicant had no policy of insurance. His application then stood suspended, and he knew it had been suspended, and he also knew the reason for the suspension. Recovery may not be had on the application."

The procedure followed in the *Warren* case is just what would have happened in the case before us if the proposed insured had completed his medical examination on the date of the application and the papers had been fully forwarded to the defendant in Boston, assuming that death had not occurred the following day and that the medical examination was satisfactory. The report of the Retail Credit Company would have unquestionably disclosed the aviation record in view of the general knowledge of the proposed insured's long aviation activity as shown by the testimony of the witnesses, Mrs. Hansen and Robert Evans (R. 52-53), and the stipulation (R. 49). It would then have appeared that the proposed insured was not insurable for the plan and rating applied for. The defendant would have called for an aviation questionnaire, and given Hinkle an opportunity to choose between an additional premium or

the amendment limiting aviation coverage. If he chose the first alternative, the policy issued would not have been a policy for the rating applied for. If he chose the second it would not have been a policy on the plan applied for, as the policy applied for contemplated no limitation of liability for death while piloting an aeroplane.

See also *Gonsoulin* v. *Equitable Life Assurance Society*, 152 La. 865, 94 So. 424, *State ex rel. Equitable* v. *Robertson*, (Mo.) 191 S. W. 989, and *Raymond* v. *National Life*, 40 Wyo. 1, 273 Pac. 667, cited by the writer of the note in 2 A.L.R. on page 987 as supporting the same rule announced in the Reynolds case from Iowa and the Warren case referred to above.

Stone v. *Prudential*, 268 N. Y. 91, 196 N.E. 754, is in line with the cases cited above where there was a misrepresentation in the application as to the insurability of the applicant. The facts are not set out in the memorandum decision of the Appellate Division, 243 App. Div. 671, 277 N. Y. S. 921, but it appears from the facts stated by the Court of Appeals that suit was brought on two applications and a receipt. The applicant died before the policies were issued, but there was evidence that he had made misrepresentations as to previous illnesses and accident. The court held in a *Per Curiam* opinion:

> "Some of the answers in the applications for insurance being palpably false, and such answers being a part of the applications which would have been incorporated in due course in the policies, it follows that the judgments in favor of the plaintiff should be reversed and the complaint dismissed, with costs in all courts."

It is fundamental that a policy can be set aside for fraudulent misrepresentations made in the application as to previous diseases, medical treatment or other matters

affecting insurability. If a duly issued and delivered policy is subject to rescission on these grounds, it obviously follows that the effect of false representations on the validity of a conditional receipt would be the same even though no policy is issued. That is the conclusion of the note writer in 2 A.L.R. 2d 1013, where he says:

> "The effect of false representations on the validity of a binding receipt is the same as in the case of a policy. It will be vitiated thereby."

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d. No issue of estoppel to assert the defenses referred to in this division of the argument is in the case because no estoppel was pleaded, and the cases referring to the so-called "mending his hold" doctrine are not applicable here.

In his petition for the writ in this case opposing counsel asserted repeatedly that estoppel had been pleaded to each defense. He attempted to distinguish the Reynolds case by saying that estoppel had not been pleaded there and conceded that under the Iowa rule estoppel must be pleaded. We called the Court's attention in our resistance to the fact that estoppel was not pleaded in the reply (R. 21) to the second defense (R. 7) in our answer, in which we alleged that no temporary contract of insurance went into effect because the applicant did not furnish evidence of insurability. In reply to the fourth defense (R. 11) in which we alleged that no temporary insurance went into effect because the applicant could not furnish evidence of insurability on account of his aviation record, the plaintiff (R. 22) alleged that the defendant was estopped to prove the answers of the applicant in the application as to his aviation activities because the defendant did not furnish

the applicant with a copy of the application. This is the only plea of estoppel to the fourth defense.

Now in his brief on the merits he has withdrawn the bald assertion that estoppel was pleaded to these two defenses and contents himself with alleging that he called attention to estoppel in his reply and "pleaded estoppel in one form or another." And he contends that the defendant is estopped from asserting its second and fourth defenses because the agent Bliss told the plaintiff after the applicant's death that the company wouldn't pay because the applicant had not had a physical examination. On the basis of this testimony he seeks to apply the decision in *Farmers Milling Co.* v. *Mill Owners Mutual*, 127 Iowa 315, 103 N.W. 207, that the defendant having asserted one ground of non-liability cannot after suit brought, allege a new ground of defense. This is his so-called "mending his hold" doctrine which he refers to again and again in his brief.

It has always been the rule in Iowa that estoppel must be affirmatively pleaded. See note in 120 A.L.R. 8, where Iowa cases filling a column and a half are cited in support of the rule that estoppel must be pleaded and if not pleaded it is inadmissible to prove it in evidence. Since the note was written the following additional cases support the rule. *In re Lunt*, 235 Iowa 62, 16 N.W.2d 25; *Mensinger* v. *Hass*, 240 Iowa 71, 35 N.W.2d 461, and *Abel* v. *Abel*, 245 Iowa 907, 65 N.W.2d 68. In one of the cases cited in the note, *Eikenberry* v. *Edwards*, 67 Iowa 14, 24 N.W. 570, the Court said that a party is not entitled to introduce evidence tending to prove an estoppel unless he has specially pleaded the facts constituting such an estoppel. And in *Federal Land Bank* v. *Sherburne*, 213 Iowa 612, 239 N.W. 778, the Court said:

> "Even then there is not a sufficient pleading of estoppel. What is pleaded amounts merely to a conclusion. No facts are set forth giving rise to the estoppel. It is not claimed that appellant was misled or in any way changed its position because of any matters stated as an estoppel. More than that, there is no proof that appellant was misled or prejudiced. Nor does it appear that appellant in any way changed its position because of anything said or done by appellee. Without such proof, there can be no estoppel."

We repeat that there is no plea of estoppel to our second and fourth defenses except the specious plea under the Iowa statute requiring that a copy of the application be attached to the policy when issued and barring proof of the application if a copy is not attached. Obviously this statute is not applicable when no policy has been issued. Furthermore, there is no claim that the plaintiff was misled or injured by Bliss' statement to her. It is not alleged that she would not have commenced the suit except for her reliance on the statement made. If the estoppel had been pleaded, the defendant would have had the opportunity to introduce evidence that a denial of liability had been made on other grounds. There is no such evidence in the Record but there was no occasion to offer it in the absence of a proper plea of estoppel. The authority of Bliss to stop the company by any statement of any kind is dealt with in another place in this brief.

Aside from the general rule relating to the necessity of alleging estoppel "with precision, certainty, accuracy and particularity", (See 120 A.L.R. 105, 107) we call the attention of the Court to Rule 8(c) of the Federal Rules of Civil Procedure:

> "In pleading to a preceding pleading, a party shall set forth affirmatively * * * estoppel * * * and any

other matter constituting an avoidance or affirmative defense."

This rule has been applied by the Courts of Appeals in a number of cases such as *Bush* v. *Remington Rand*, (2nd Cir.) 213 F.2d 456, 461; *Cummings* v. *Moore*, (10th Cir.) 202 F.2d 145, 148, where the court said if estoppel is not pleaded, it is waived; *Tornello* v. *Deligiannis Brothers*, (7th Cir.) 180 F.2d 553, 556; and particularly *Wackerle* v. *Pacific Employers Insurance Co.*, 219 F.2d 1, 7, from the Eighth Circuit, certiorari denied 349 U.S. 955, 99 L.Ed. 1279. The opinion in that case was written by the Judge who wrote the opinion in the case at bar and concurred in by the Judge who dissented in the case at bar. The Court said:

> "Appellee further argues that the insured, and consequently the appellants, would be estopped from raising the defense of lack of consideration. Estoppel is not pleaded. This issue does not appear to have been raised in any way in the trial court. Estoppel is an affirmative defense which must be pleaded. Rule 8(c), Federal Rules of Civil Procedure, 28 U.S.C.A. If not pleaded the defense can not be raised on appeal. Mutual Benefit Health & Accident Ass'n v. Cohen, supra, footnote 2, page 234; Cummings v. Moore, 10 Cir., 202 F.2d 145; Tornello v. Deligiannis Brothers, Inc., 7 Cir., 180 F.2d 553."

The footnote in *Mutual Benefit* v. *Cohen*, (8th Cir.) 194 F.2d 232, refers to an estoppel urged by the appellant and says:

> "No such issue was in the court below. It is not for our consideration on this appeal."

There is not a mention of the "mending his hold" estoppel in the Record in the trial court. Counsel complains because the Court of Appeals refused to follow the Iowa decisions on the general law of estoppel and suggests

that the dissenting opinion is based on an estoppel doctrine. There was no occasion for the Court of Appeals to consider any Iowa decisions on estoppel and we cannot find the words "estoppel" or "estopped" in the dissenting opinion. Neither the majority opinion nor the dissent said anything about estoppel because estoppel was not pleaded.

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e. This Court should give weight to the fact that the opinion of the Court of Appeals, based on the law of Iowa, was written by an Iowa judge of long experience as a trial judge in Iowa.

The opinion of the Court of Appeals was written by Judge Martin D. Van Oosterhout. It appears from Who's Who in America for 1956-1957 that he was admitted to the Iowa bar in 1924, and was a judge of the 21st Judicial District of Iowa for eleven years, 1943-1954. The opinion was concurred in by Judge John B. Sanborn, formerly Commissioner of Insurance of Minnesota, who has been a member of the Court since 1932. The trial judge was a resident of Missouri, assigned to the Southern Iowa District Court. This Court has repeatedly held that a holding on a question of state law by a judge who is a resident of that state will ordinarily be left undisturbed.

As stated by Mr. Justice Douglas in *Ragan* v. *Merchants Transfer & Warehouse Company*, 337 U.S. 530, 93 L.Ed. 1520, in referring to a holding of the Court of Appeals for the Tenth Circuit with respect to the law of Kansas:

> "It is argued that the Kansas Statute in question is not an integral part of the Kansas statute of limita-

tions. But the Court of Appeals on a careful canvass of Kansas law in an opinion written by Judge Huxman, a distinguished member of the Kansas bar, has held to the contrary. We ordinarily accept the determination of local law by the Court of Appeals (see Huddleston v. Dwyer, 322 U.S. 232, 237, 88 L.Ed. 1246, 1249, 64 S. Ct. 1015), and we will not disturb it here."

Mr. Justice Reed in *Helvering* v. *Stuart*, 317 U.S. 154, 87 L.Ed. 154, speaking of the decision of a Court of Appeals construing a trust under the law of Illinois said:

"This conclusion does not spring from a statute of that state nor even from a clear or satisfying line of decisions. It is, however, the reasoned judgment of the circuit which includes Illinois in which a judge of long experience in the jurisprudence of that state participated. Without a definite conviction of error in the conclusion, this Court will not reverse that judgment."

And in *Spiegel's Estate* v. *Commissioner*, 335 U.S. 701, 93 L.Ed. 339, which also involved the construction of a trust under Illinois law, Mr. Justice Black said:

"The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals' holding was wrong. It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die the trust corpus should revert to the donor. It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general

policy and leave undisturbed this Court of Appeals' holding on a question of state law."

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f. There is no conflict between circuits on the question involved.

In his brief opposing counsel repeats almost verbatim the contention made in his petition that there is a conflict between circuits because of the decisions in *Gaunt* v. *John Hancock Mutual,* (2d Cir.) 160 F.2d 599, and *Liberty National Life* v. *Hamilton,* (6th Cir.) 237 F.2d 235. It is obvious in the first place that the courts in these two cases were governed by the law of two states other than Iowa. Furthermore, if we examine these decisions we find that there is no actual conflict.

In the *Gaunt* case, 160 F.2d 599, the receipt was conditioned upon insurability *and* the approval of the application at the home office of the company prior to the applicant's death. The applicant had taken a medical examination and had been found insurable by the medical examiner but was killed before the approval of the application at the home office. The lower court found that the application would have been approved if the company had not been notified of the applicant's death. The substance of the opinion is that the receipt which is entirely different from the receipt in the case at bar was ambiguous and having been prepared by the insurance company should be construed against it.

This case is not in conflict with the case at bar for two reasons: (1) In the case at bar the applicant had not been examined and found insurable and the Court of Appeals

held that it was conclusively proved that he was not insurable for the plan and rating applied for because of his aviation activities. The Court was thoroughly justified in using the word "conclusively" because the only evidence on the subject was that of the Vice-President of the company who testified that in view of such activities the contract would not have been issued as applied for. If issued it would have contained an aviation exclusion clause or provided for an extra premium; (2) no claim was made in the pleadings or in argument that the receipt in the case at bar was ambiguous and any layman reading it would know that it was a conditional receipt and that the two provisos, good health and insurability, had to be complied with. The Court of Appeals said:

> "From our consideration of the authorities heretofore cited, we believe that the Iowa court would not find the conditional receipt ambiguous * * *"

In the *Liberty National* case, 237 F.2d 235, the receipt, although it contained a provision for insurability, was denominated as a "binding receipt" in the briefs and it referred in two places to "*the insurance granted hereunder.*" These words are emphasized by the Court in its opinion. The applicant had a physical examination by the Company's examiner and disclosed his entire medical history and the court found that the examination was satisfactory. There was lay and medical testimony that the applicant was insurable and said testimony was sufficient to raise a question for the jury. Here again the court found ambiguity and resolved it against the Company. It was a Tennessee contract and the court after examining the Tennessee decisions was in doubt as to the local law involving ambiguities as to the time when the insurance would become effective. Certainly the reference to "insurance granted hereunder" would lead the applicant to believe

that he was already covered. In the case at bar the receipt was entitled "Conditional Receipt". It recites that it was made "in connection with an application" for insurance and it refers specifically to the "insurance applied for", not to the "insurance granted hereunder". Furthermore, as stated above, there was no evidence in the case at bar that the applicant was insurable on the date of the receipt. On the contrary the evidence showed that he was not insurable for the plan and rating applied for. No claim of ambiguity was made by the plaintiff.

The decision in the case at bar is in line with the decision of the Court of Appeals for the 10th Circuit in *Mofrad* v. *New York Life*, 206 F.2d 491 and with *Warren* v. *New York Life* in the 5th Circuit, 128 F.2d 671. Counsel complains because the law is different in different jurisdictions and it is undoubtedly true that the law of insurance varies in different states. The same court which decided in favor of the plaintiff in the *Liberty National* case, *supra*, held that there was no temporary contract of insurance in *Bellak* v. *United Home Life*, 211 F.2d 280, unless there was an unreasonable delay in acting on the application, because there it was bound by the law of Michigan. This divergence of opinion in different states is no ground for reversing the decision of the Court of Appeals in this case where it followed the Iowa law.

It seems to us that opposing counsel has taken absolutely inconsistent positions. In one breath he says that the Court of Appeals violated the Erie Railway case rule because it did not follow Iowa law and he refers to the Reynolds case. In the next breath he contends that the federal courts should adopt a uniform rule independently of the law in the several states with respect to conditional receipts. Obviously this is impossible. The receipts used by the various companies are not uniform and the federal

courts in determining the laws of the various states can not adopt a uniform rule when the decisions of the various states may not be uniform. The only way to achieve uniformity (assuming uniformity in the receipts) would be to overrule the Erie case and adopt a federal rule of general law regardless of state decisions. In other words, go back to *Swift* v. *Tyson.*

Division II.

The conditional receipt was not in itself a contract for temporary insurance but merely a receipt given in connection with Part I of an application for life insurance stating the terms upon which the insurance would be effective from date if the conditions therein were fulfilled. It should not be considered alone but with said application, and as said application was never completed by taking a medical examination and the minds of the parties never met, no contract of insurance, temporary or permanent, ever went into effect.

The Court of Appeals held that the defendant was entitled to a directed verdict because the conditional receipt was conditioned upon insurability and the proposed insured was not insurable for the plan and rating applied for. In view of its decision on this point it did not consider the other questions raised by the defendant in its motion for directed verdict. Par. 1 of said motion (R. 55) reads as follows:

> "1. The conditional receipt offered in evidence, and alleged to be a contract of insurance is not a contract, but a receipt delivered to evidence the payment of a first premium in connection with an application for life insurance, and the terms upon which the first

premium was paid. It was merely a part of a transaction which constituted an application for life insurance. Said application was not completed and was not accepted by the defendant, and there was no meeting of the minds of the parties to form a contract."

It is the law of Iowa and the general rule that if there are any grounds in the record upon which a court's ruling can be sustained an appellate court should follow the trial court even though it based its holding on some other ground. See *Lewis* v. *Minnesota Mutual*, 240 Iowa 1249, 37 N.W.2d 316, and other Iowa cases cited therein. The same rule is applicable to the decision of an intermediate appellate court. Even if we were to concede for the purpose of argument that the Court of Appeals was wrong in holding that the company was entitled to a directed verdict under the Iowa law relating to receipts conditioned upon insurability as laid down in *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N.W. 207, its direction to enter judgment in favor of the defendant should be affirmed if the defendant was entitled to a directed verdict under the first ground of the motion as stated above or any other ground of said motion not considered by the court.

To understand the receipt it is necessary to read it with the application. It recites that it was made *in connection with an application* made this day to the defendant for insurance. It refers to the insurance *applied for* and it expressly contemplates that the application may be declined and the amount paid refunded (Emphasis ours). The application provides that if the first premium is paid with the application, the insurance shall take effect as stipulated in the Conditional Receipt (R. 19). The District Judge said that the receipt by itself was a temporary contract of insurance conditioned only upon the first proviso, namely the proposed insured's good health on its date.

He ignored entirely the second proviso referred to above and said that the application could be disregarded completely. This is not the law. In view of the language in the receipt referred to above, the receipt and the application should be considered together as parts of one transaction, namely, an application for life insurance.

In *Himes* v. *Metropolitan*, 207 S. C. 420, 36 S.E.2d 137, where the receipt recited that it was made in connection with an application, the court said:

> "The application and receipt must be construed together and constitute a written agreement between the parties."

To the same effect is *Cooksey* v. *Mutual Life*, 73 Ark. 117, 83 S.W. 317, where the court held that the application and receipt should be read together and *Jenkins* v. *International Life*, 149 Ark. 257, 232 S.W. 3, where the court said:

> "The application and the receipt each contain provisions which show that the receipt must be considered in connection with and as a part of the application."

And in *Pace* v. *Provident Savings Life*, (5th Circuit) 113 Fed. 13, in a brief *per curiam* opinion, the court held that if the receipt for the first premium is considered as a binding receipt, still it must be construed in connection with the application.

The holding of the District Judge that the application could be disregarded and the receipt relied upon as the sole contract is absolutely inconsistent with his holding as to the right of the plaintiff to recover in her individual capacity. It will be remembered that the petition was in four counts. In the first two counts the plaintiff sued as administratrix of her husband's estate. In the last two

counts she sued in her individual capacity repeating the allegations of Counts I and II and further alleging that she was the beneficiary in the application. The District Judge withdrew Counts I and II from the jury and held that if she was entitled to recover she was entitled to recover individually under Count IV. But if she was entitled to recover individually her sole right to recovery was based on the fact that she was named in the application as beneficiary. Yet the court said the application had nothing to do with her right of recovery. Almost this same situation arose in *Maddox* v. *Life and Casualty Co.*, 79 Ga. App. 164, 53 S.E. 2d 235. Suit was brought by the beneficiary named in the application. In her first count she sued on the receipt, and she contended on appeal from a demurrer dismissing her suit that the action was on the receipt alone. The Court said:

> "It is only necessary to again call attention to the facts that in the receipt the plaintiff is not named as beneficiary nor is any amount of insurance provided for. If there was a cause of action on the receipt, it was not in the plaintiff. It is plain that the plaintiff had no cause of action without consideration of the application and that examination of the application was necessary to determine whether she had or not."

In the case at bar the District Judge went to Part I of the application to hold that it was the plaintiff individually who had the right to recover because she was named as the beneficiary in the application (R. 54), but ignored Part I of the application completely by holding that the receipt was the only contract. If the receipt was a contract, which of course we deny, then the right of recovery would be in the administratrix. If the receipt and Part I of the application are considered together, as they should be considered, they constitute one transaction, namely a partial application for life insurance, to be completed by a medical

examination and forming no basis for a contract until so completed.

The blank receipt in the case at bar was originally a part of Part I of the application and was detached therefrom and given to the proposed insured (R. 34-35). Immediately above his signature on Part I of the application (R. 19) appears this agreement: "It is Hereby Agreed that this Application including Part II a copy of which shall be attached to the Policy when issued, shall become a part of every Policy issued hereon." This language in itself was notice to the applicant that the application was incomplete. It is also clear from the record that the applicant was orally notified that a medical examination was necessary and an appointment was made for it (R. 34). The failure to take it was not due to any fault or neglect on the part of the defendant or its agent. The fact that the appointment was never met because of the death of the proposed insured does not mean that the examination was waived or the failure to take the examination excused. It simply means that through no fault of the defendant the application was never completed.

In *Beyer* v. *Central Life*, 199 Iowa 245, 201 N.W. 577, the conditional receipt required that the application be accepted and a policy issued and delivered before the insurance would go into effect. The application was in fact rejected and the main issue in the case was whether the company was estopped to deny liability because of a statement by the agent that the application had been accepted. The court had this to say about the general question under discussion in this division of our brief:

> "But there can be no valid and enforcible contract without, at least objectively, a meeting of the minds of the parties. The application for a policy of insurance is, in legal effect, an 'offer' on the part of the applicant.

> The offer must be accepted in some manner by the company, before it can be bound to issue its policy of insurance. The subject-matter of the contract between the parties is the policy of insurance; but the contract for such a policy is made as all other contracts are made—by an 'offer' by one party and an 'acceptance' by the other."

In *Muhlbach* v. *Omaha Life*, 107 Neb. 206, 185 N.W. 447, the applicant paid the first premium and stated in the application that there never had been any insanity in his family. The application provided: "I * * * hereby apply to Omaha Life Insurance Company for a policy on the twenty pay plan." Similarly in the case at bar the receipt referred to payment made "in connection with an application" to the defendant for insurance of $10,500 and referred in the following paragraph to "The Insurance applied for". The Nebraska court said with respect to the above provisions:

> "The applicant applied for a policy instead of a contract of insurance to become effective before the issuance of a policy."

The company acknowledged receipt of the application and premiums and wrote the applicant that upon the receipt of the medical and approval the policy would go forth. The applicant was in good health at the time. However, he left the office of the medical examiner before the examination was completed and never returned. Four days later he was found dead. The Court held that there was no contract of insurance and said:

> "Both insurer and applicant, in negotiating for life insurance, should contemplate an investigation sufficient to disclose all facts essential to an insurable risk and to reputable underwriting, since this is required by honest business and common sense. If these tests

> could be safely used in determining the amounts of annual premiums, policyholders and insurers generally would be alike benefited. Part of the applicant's consideration for life insurance on the twenty-payment plan failed—disclosure of physical conditions and family history. As a result, the risk was not approved and the policy was never issued. A life insurance risk, before the issuance of a policy for which an application has been made, is not assumed until the minds of both applicant and insurer meet on definite terms to that effect."

The Nebraska court also referred to the provision in the receipt to the effect that if the policy is not issued, the amount receipted for would be returned. A similar provision is in the receipt in the case at bar. The court said with respect to this:

> "This receipt not only gave notice to the applicant that the premium was accepted on condition of the medical director's subsequent approval of the insured, but it contained a definite promise to return the amount of the premium paid, 'if the policy as applied for shall not be issued'. Having thus agreed in advance to return all the premiums paid, if the policy should not be issued and the policy without fault of the defendant, not having been issued, no consideration whatever remained for insurance of a temporary nature during the time intervening between the date of the application and the approval or rejection of the risk on the twenty-payment plan. There was therefore no agreement or consideration for present binding insurance."

As bearing on the necessity for a medical examination we also refer the Court to *Mofrad* v. *N. Y. Life,* (10 Cir.) 206 F.2d 491, cited by the Court of Appeals in the case at bar, *Paulk* v. *State Mutual,* 85 Ga. App. 413, 69 S.E.2d 777, and *Corn* v. *United American Life,* (D.C. Colo.) 104 Fed. Supp. 612.

We contend that under the fundamental rules of contracts as laid down in the above cases there is no contract until there has been a meeting of the minds. There must be an offer and an acceptance and there must be a complete offer before there can be an acceptance. Part I of the application in the case at bar was part of an offer, but it was not complete because there was no medical examination. The offer was therefore never communicated to the defendant at its home office where it had to be acted on and there was no acceptance. The minds of the parties never met.

Division III.

The words "Immediate Coverage" written on the conditional receipt by Agent Bliss under the amount of the insurance applied for, namely $10,500, added nothing to the effect of the receipt, but if these words are construed as the agreement of Bliss to create an immediate contract for temporary insurance and to waive the provisos in the receipt, said contract was not binding on the defendant because Bliss had no authority to make contracts of insurance for the defendant.

It is the contention of the plaintiff as set forth in Count I of the petition (R. 2 and 3), made by reference a part of Count IV, that the receipt itself was a contract of temporary insurance because of the insertion of the words "Immediate Coverage" written on the receipt with pen and ink by Agent Bliss. It is the contention of the defendant that the addition of those words added nothing to the legal effect of the receipt and if construed to make it a contract of temporary insurance effective immediately, it was not binding on the defendant because of Bliss' lack of authority.

With regard to the words "Immediate Coverage" the trial judge told the jury he gave no consideration to those words at all, because the language of the receipt "The insurance applied for shall be in full force and effect from this date" meant the same thing as "immediate coverage." (R. 66). We contend that the Record shows that these words should be construed to indicate the initial death benefit. If, however, the conditional receipt means what opposing counsel says, it means that the insurance went into effect on the date of the receipt regardless of the construction given to the words. The Court of Appeals also held that the addition of those words did not change the meaning of the contract. It said: "The conditions were not eliminated from the receipt, nor were they expressly waived. The conditions remained a part of the receipt as delivered. We do not believe it can fairly be said that the addition of the words 'Immediate Coverage' was intended to eliminate the conditions. Under such a construction of the contract as a whole we do not reach the serious question of the authority of the agent Bliss to alter the receipt or to agree to immediate unconditional coverage." (R. 90, 91).

Paragraphs 4 and 5 of the motion for directed verdict read as follows:

> 4. The insertion of the words "immediate coverage" below the amount of insurance applied for in the conditional receipt does not convert the receipt into a contract of temporary insurance in view of the fact that a decreasing term policy was applied for, and the proposed insured was advised that the amount of insurance in the first year was $10,500, and would decrease annually thereafter.
>
> 5. If said receipt is construed to be a contract of insurance because of the addition of the words "immediate coverage" under the amount of insurance applied for, said contract is not binding on the de-

fendant because the agent, Bliss, had no authority to make, alter or discharge any policies, contracts or agreements on behalf of or in the name of the company, or, to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the company, to incur any obligations or liability for which the company should be responsible.

As noted above the Court of Appeals did not pass on this point but if the motion should have been sustained on this ground, the decision of the Court of Appeals directing judgment for the defendant, should be affirmed.

The testimony of agent Bliss shows that the words "Immediate Coverage" written by him on the receipt were intended to refer to the initial amount of insurance applied for (R. 35). The policy was a decreasing term policy and the face amount would be reduced from year to year at the rate of $500 per year. The policy had been explained to the applicant and he wanted the decreasing term policy to take care of the decreasing balance of a mortgage on his home, payable in installments. The printed form of receipt had no space to describe the policy in detail and if the amount had been written $10,500 without some explanation, it would have appeared on the face of the receipt that the applicant had applied for a fixed amount of $10.500 of insurance.

Furthermore we call the court's attention to the place where the words were inserted, namely directly under the figure "$10,500". There was no reason for inserting the words at that particular place unless it was to emphasize the initial or immediate amount of coverage which was $10,500, but which would not remain at $10,500 during the expected duration of the decreasing term policy.

Even assuming that Bliss intended to violate his agency contract and to change the receipt by eliminating the pro-

visos, he would have written "Immediate Coverage" across the top of the receipt or stricken out the provisos with pen and ink. He testified:

> "I made it a point of making it crystal clear to Mr. Hinkle that this was decreasing term insurance, that the $10,500 was not a permanent situation, and as I have explained to the court and jury it decreases each year. That is the reason why I wrote it in the receipt, I put that in so there would be no misunderstanding at all on the part of Mr. Hinkle. I told Mr. Hinkle why I put that in and wrote it out so there is no possible chance of any misunderstanding." (R. 35).

However, if we are wrong about this construction of the phrase and if the words "immediate coverage" are construed by the court to mean that the agent agreed that the insurance would be in effect from the date of the receipt without any medical examination, such an agreement was not binding on the defendant.

In *Beyer* v. *Central Life*, 199 Iowa 245, 201 N.W. 577, the application was actually rejected by the company at its home office but the agent wrote the plaintiff who was to be the beneficiary in the policy applied for by his wife and told him that she had been accepted and that he would be over in the near future and deliver the policy. The applicant died about six weeks later without knowing that the application had been rejected. The court held that the defendant was not bound by the act of the agent and said:

> "Appellant contends that the act of the agent was, in effect, the act of the principal, and bound the principal thereby. It is hornbook law that a principal can only be bound by the acts of his agent within the scope of the authority conferred upon the agent, either expressly or impliedly. It never has been and cannot be the law that a principal can be bound by the acts

of its agent which are not only unauthorized, but are directly contrary to the authority conferred, where no question of estoppel is involved."

A number of fire insurance cases can be found where the courts hold that a mere soliciting agent cannot bind the company by an agreement making the insurance effective but that a general agent can. That is because a general agent of a fire insurance company can issue contracts and bind the company immediately by putting it on the risk. A general agent of a life insurance company cannot make contracts of insurance, and so far as his authority to make and alter contracts of insurance is concerned, he has no greater authority than the soliciting agent of a fire insurance company.

While it is true that Bliss was referred to as general agent in his contract of agency and given the power to appoint agents the scope of his authority and the limitations of his authority are specifically stated in his contract as follows (R. 37):

"SECTION 1.

SCOPE OF AUTHORITY.

The General Agent is hereby authorized to appoint and contract with Agents and Brokers, to procure, personally and through such Agents and Brokers, applications for policies and to forward them to the Home Office of the Company for consideration, and to deliver policies and premium receipts, upon payment of the amounts specified therein and upon compliance with the terms and conditions governing such delivery.

SECTION 2.

LIMITATION OF AUTHORITY.

The General Agent is expressly forbidden to make, alter or discharge any policies, contracts or agree-

ments on behalf of, or in the name of the Company, or to waive any forfeiture, or, except as otherwise agreed to in writing by a duly authorized officer of the Company, to incur any obligations or liability for which the Company shall be responsible."

These provisions of his contract plainly show that he had the same authority as the soliciting agents referred to in the following cases. For instance, in *Sommerio* v. *Prudential*, 289 Ill.App. 520, 7 N.E.2d 631, the receipt was conditioned upon the approval of the application at the home office of the defendant. The agent in question was an assistant superintendent at an office of the defendant in Chicago and he had authority to take applications, collect premiums, forward applications to the home office and deliver policies when issued. His authority was practically identical with that of agent Bliss in the case at bar. He testified that he told the applicant that the policy would take effect upon the date of the receipt. The court held that his agreement was not binding on the defendant and that it was incumbent on the plaintiff to show the specific authority claimed.

Further cases on the power of an agent with limited authority to bind the company to contracts of insurance are *Patterson* v. *Prudential*, (Mo. App.) 23 S.W.2d 198, cited by the Illinois Court in the Sommerio case referred to above, *Arnold* v. *Life and Accident Insurance Association*, 30 Tenn. App. 166, 204 S.W.2d 191, certiorari denied by Supreme Court, and *Missouri State Life* v. *Boles*, (Tex. C.A.) 228 S.W. 271.

We want to emphasize the fact that the conditional receipt itself brought home to the proposed insured the lack of authority of Bliss to make contracts of insurance for the defendant. It specifically provides for the furnishing of evidence of insurability to the defendant at its home of-

fice and for the determination by the Company of the insurability of the proposed insured. It tells the proposed insured to notify the Company at Boston if he does not hear from the Company within sixty days. These provisions of the receipt put Hinkle on notice that Bliss had no authority to determine insurability. It had to be done at the home office in Boston.

In *Basinsky* v. *National Casualty Co.*, 122 Wash. 1, 209 Pac. 1077, the application for an accident insurance policy provided that it would not be binding on the company until accepted at the home office or by an agent duly authorized to issue policies. The receipt was given for the first premium which provided that if the company declined or failed to issue a policy within twenty days the premium would be returned. Before the policy could be issued the applicant was injured and he was permitted to testify that the agent told him he was protected from the date of the receipt. The Supreme Court held that the applicant was bound by the provision of the application to know that the agent could not accept the application and he had no right to rely on any such statement by him since the application by necessary inference showed he had no such authority. By the same token Hinkle was bound to know that Bliss had no power to approve his application and if "Immediate Coverage" is construed to mean a promise by Bliss that the insurance went into effect at once that promise is not binding on the defendant.

See also *State Life Insurance Company* v. *Thiel*, 107 Ind. App. 75, 20 N.E.2d 693, *Mutual Benefit* v. *Edwards*, 174 Okla. 210, 50 P.2d 144, and *Harris* v. *Mutual Benefit*, 187 Ark. 1038, 63 S.W.2d 975.

In a case recently reported, *Botts* v. *Shenandoah Life*, (Fed. D. C. Va.) 134 Fed. Supp. 893, involving the author-

ity of an agent to promise a certain dividend, the court made the distinction between life insurance agents and other insurance agents which we have referred to above. The court said:

> "The authority of a life insurance agent is very different from that of a fire or casualty insurance agent. As is generally known, the latter may, and universally does, make binding contracts of insurance for his principal; on the contrary, a life insurance agent may only take applications for life insurance and is never authorized to actually make contracts."

This distinction is recognized by statute in Virginia but is a valid distinction in the absence of statute.

On the point covered in this division of our argument opposing counsel cites three Iowa cases. *McDonald* v. *Equitable Life Assurance Society*, 185 Iowa 1008, 169 N.W. 352, involved a life insurance policy and the authority of an agent to waive a lapse. The facts are entirely different from those in the case at bar, and the discussion of the authority of the agent is dictum because the court held that the act of the agent was ratified by the defendant. *Nertney* v. *National Fire Insurance Co.*, 199 Iowa 1358, 203 N.W. 826, was a fire insurance case and *Boever* v. *Great American Ins. Co.*, 221 Iowa 566, 266 N.W. 276, was a hail insurance case which followed the Nertney decision. In the *Nertney* case, the court held that when it is shown that it is the custom of the company upon accepting the application to issue its policy covering the period from the date of the application, its agent taking the application has implied or apparent authority to make a valid preliminary contract of insurance effective from the making of the application until its acceptance or rejection. In an effort to bring this case under the same rule counsel refers to a provision on the back of the application in the case at bar,

Exhibit D, to the effect that when the premium is paid in advance, the policy will usually bear that date *if issued as applied for* (Emphasis ours). He also refers to the testimony of the company's vice president to the effect that the premium date is on some occasions the date of the application, and that in the case at bar if the policy had been issued as applied for within a very short space of time it would have been dated the date of the application.

Counsel contends that with this evidence the rule in the *Nertney* case applies to the case at bar. It is clear that if Hinkle had been examined and found in good health and there had been no question about his insurability in other respects, a policy would have been issued. As the receipt provided that the insurance would be in effect from its date if the provisos were complied with, it would be perfectly natural and logical to date the policy the date of the receipt. We cannot see how this practice gave an agent of the defendant, Bliss, express or implied authority to waive the provisos in the receipt. The same situation existed in the *Reynolds* case, 189 Iowa 76, 176 N.W. 207, discussed in Division I, b, of this brief. As the Court held in that case, if the application had been accepted, the insurance would have become effective from the date of the medical examination. But as the applicant was not insurable on that date, no temporary insurance became effective. Furthermore, the *Nertney* case is a fire insurance case and all the authorities cited in the opinion are fire insurance cases. Counsel ignores the vital difference between the fire insurance business and the life insurance business.

The whole business of fire insurance is based upon immediate binders. When a man acquires a house or an automobile, he wants it covered right then, not at some time in the future. If he is not covered immediately and

his house burns down before the policy is effective, he is out of luck. He has received absolutely no benefit for any premium which he may have paid in advance for the period from the date of payment to the date of coverage. But in life insurance if the premium is paid in advance and the receipt is conditioned on the insurability of the applicant, he does get something. If he is insurable then, he is covered if his death occurs or his health changes after the date of payment. His insurability does not have to be approved before his death. If he is not insurable, he never is covered, and he has no right to be covered.

The testimony of Bliss that he wrote the words "Immediate Coverage" to make it "crystal clear" that this was decreasing term insurance (R. 35) was not offered as parol testimony to vary the terms of the written contract. It was not offered as a construction of the receipt on account of its ambiguity because there was no ambiguity in the receipt. Opposing counsel makes no claim of any such ambiguity in his pleadings or argument. The testimony was offered as an explanation of why the language was used. If this language was a variance of the other terms of the receipt, which we deny, it was not binding on the defendant because Bliss had no authority to make or alter contracts on behalf of the defendant under the authorities cited.

The plaintiff contends that the defendant is estopped from asserting that Bliss had no authority to bind it by a temporary contract of insurance because it never asserted said defense before filing its answer in the case. There is no evidence in the record that the defendant as such ever asserted any of its defenses before its answer although the court will assume that there must have been a denial of liability before the action was commenced. The plaintiff testified that Bliss told her over the telephone that they wouldn't pay because there had been no physical examina-

tion (R. 29). Bliss had no authority to bind the defendant by any statement that would estop it or enlarge its liability under the conditional receipt. No statement by an agent could estop his principal from asserting the lack of authority of the very agent who is making the statement.

The burden of proof was on the plaintiff to prove Bliss' authority. The only evidence in the Record as to his authority is his contract of agency. Adopting the plaintiff's theory of the case, that the addition of the words "Immediate Coverage" created an immediate contract of insurance and waived performance of the provisos in the receipt, the defendant was entitled to a directed verdict because the act of Bliss was not binding on it.

Division IV.

There was never a complete application for life insurance for the further reason that Section 508.28 of the Code of Iowa prohibits the issuance of any contract of life insurance in an amount in excess of $10,000 until a satisfactory medical examination shall have been passed and approved by the medical examiner or medical board of the company, and because of the failure of the proposed insured to have such medical examination, he failed to make a complete application on which a valid contract of insurance could be made. Any attempted contract of temporary insurance made in violation of the statute would be invalid.

We call the Court's attention to grounds 6 and 7 of the motion for directed verdict (R. 56, 57). They read as follows:

> "6. If said receipt is construed to be a contract of insurance, it is not a valid contract under the laws of Iowa because the defendant was prohibited by the

statutes of Iowa from issuing contracts of insurance in an amount more than $10,000 without a medical examination duly passed and approved by the medical examiner or the medical board of the company. Section 508.28 of the Code of Iowa, 1954, requires or contains this language: 'The Commissioner of Insurance shall decline to approve any form of policy unless issuance is based upon the satisfactory medical examination of applicant by a physician, and no policy or contract shall be issued by any insurance company to any individual until such examination has been passed and duly approved by the medical examiner or the medical board of the company.' And then in a subsequent section there is a provision that non-medical insurance may be issued up to $10,000."

"7. It appears from the record that there was no medical examination because of failure of the proposed insured to have an examination. Therefore, he failed to furnish an application upon which the defendant, under the law of Iowa, could insure his life for $10,500."

These two paragraphs should be read together as one ground of the motion.

The Court of Appeals did not pass on this ground. It said in its opinion:

"The conditional receipt on the basis of the words it contains can not fairly be construed to add the medical examination as an additional condition precedent. Whether by implication of law such a condition is to be read into such receipt because of Section 508.28 of the Code of Iowa 1954, prohibiting the issuance of a policy of life insurance for more than $10,000 until a satisfactory medical examination shall have been passed and approved by the medical examiner or medical board of a life insurance company, raises an unsettled question of Iowa law upon which we deem it unnecessary, and hence, inadvisable to express an opinion."

We contend that the motion for a directed verdict should have been sustained on this ground and we say again that conceding for the purpose of argument that the Court of Appeals erred in its decision with respect to the Iowa law on a receipt conditioned upon insurability, the case should not be reversed if the ground stated in paragraphs 6 and 7 above was a valid ground for such direction.

Section 508.28 of the Code of Iowa 1954 reads as follows:

"508.28 Policy provision for medical examination

The commissioner of insurance shall decline to approve any such form of policy or contract of insurance unless the same shall, in all respects, conform to the laws of this state applicable thereto, and unless the issuance of the same is based upon a satisfactory medical examination of the applicant by a physician duly authorized to practice medicine or by an osteopathic physician duly authorized to practice osteopathy in the state of Iowa or the state where examined, and no policy or contract of insurance shall be issued by any insurance company to any individual in this state until such examination shall have been passed and duly approved by the medical examiner or medical board of such company.

Provided that medical examination of the applicant as condition precedent to approval of policy forms shall not be required in the case of juvenile and industrial policies, and policies in amount of ten thousand dollars or less and additional insurance without medical examination may be issued in an amount not to exceed ten thousand dollars subsequent to the issuance of any policy on said life after medical examination; policies so written shall be incontestable for any reason except for nonpayment of premiums after two years from date of issue."

Aside from the express notice to the applicant of the necessity of having a medical examination, as shown by the evidence, he was bound by the provisions of the above statute to know that no contract of insurance could be issued to him unless he passed a satisfactory medical examination which was duly approved by the medical examiner or medical board of the defendant. By his failure to have such examination he failed to present to the defendant an application upon which it could under the law of Iowa issue him a policy for $10,500.

We have not been able to find a court decision involving this particular statute and its effect upon a conditional receipt such as is involved in the case at bar. However, prohibitive statutes of the same general nature have been applied by the courts in cases where the plaintiff claimed on a temporary contract of insurance. For instance, in *Pralle* v. *Metropolitan*, 346 Ill. 58, 178 N.E. 371, the plaintiff claimed that the defendant entered into an oral contract of accident insurance with her husband. Illinois has a statute similar to Section 508.25 of the Iowa Code which provides that it shall be unlawful for any life insurance company to write or use any form of policy or contract of insurance until a copy of such form or contract has been filed with and approved by the commissioner of insurance. The Illinois statute provides that no accident policy shall be issued until a copy of the form shall have been filed with the insurance superintendent, and provides a standard form of policy. The defendant contended that the alleged contract of insurance declared upon could not be lawfully issued under the Illinois statute. The court upheld this contention and said:

> "It seems clear, therefore, that it is the intent and purpose of the act that oral contracts for accident and casualty insurance of the character here claimed are prohibited."

An Oregon statute requires a fire insurance policy to contain certain standard provisions. In *Salquist* v. *Oregon Fire Relief Assn.*, 100 Ore. 416, 197 Pac. 312, the plaintiff claimed that an existing fire insurance policy had been renewed by an oral agreement with an agent of the defendant. The court said:

> "Under this statute it could not be lawfully within the contemplation of the parties that any liability should inure against the defendant except upon a contract such as the law prescribes. In other words, requiring, as it does, that any policy, whether original or a renewal, shall contain the statutory conditions, the enactment in question prescribes an exclusive evidence of contract, analogous to such enactments as the statutes of frauds. Oral contracts of insurance are impossible under our statute."

In *Munhall* v. *Travelers,* 300 Penn. 327, 150 Atl. 645, the plaintiff claimed as beneficiary under an alleged oral contract of life insurance made by the defendant's agent to the effect that if the applicant passed the physical examination and paid the premium the defendant would insure him. The examination was satisfactory and he paid the premium. The court held that there was no contract because the application had not been accepted and no policy issued, but went on to say:

> "We are of the opinion that, in addition to what has been said as to the plaintiff's inability to recover, a statute not referred to in the brief on either side in terms prevents oral contracts of life insurance in this state. The act * * * provides: 'Policies of Insurance, made or entered into by any * * * company, may be made either with or without the seal thereof, and they shall be subscribed by the president, or such other officer as may be designated by the directors * * * for that purpose, and * * * attested by the secretary * * * and, when so subscribed and attested, shall be obliga-

> tory on the company' and its effect is that all contracts of life insurance must be in writing (a wise and salutary requirement to prevent fraud), that they shall be subscribed by the president of the company or some other designated officer and be duly attested, 'and, when so subscribed and attested, shall be obligatory on the company.' Under this language a contract of insurance not in writing is not obligatory on the company. Section 410 of the Act of 1921 (West's Supplement, p. 548, Sec. 12490b-410), which stipulates that no policy shall be issued or delivered unless it contains uniform provisions there specified, clearly implies that all contracts of life insurance must be in writing."

Applying the reasoning of these decisions to the case at bar it is clear that the proposed insured is conclusively presumed to have known by reason of the Iowa statute that the issuance of a policy without a medical examination in a sum in excess of $10,000 was prohibited by law and that the defendant could not have passed on his application unless the report of the medical examination was made a part of it. As stated in the *Munhall* case, *supra*, 150 Atl. 645, on page 647, the applicant knew from the language of the receipt that the application had to go to the home office of the defendant in Boston before being acted on, and he knew from the language of the application that Part II of the application was to be a part of any policy issued thereon. He must have known that a temporary contract of insurance to take effect before the medical examination was prohibited by the Iowa law, and he must have known that there could be no insurance in effect until he had completed the application by taking the medical examination. The defendant was prohibited by the Iowa statute from entering into any contract of insurance until satisfactory report of the medical examiner had been received and approved by it at its home office.

We contend that under the Iowa statute prohibiting the issuance of a policy of life insurance for more than $10,000 until a medical examination shall have been passed and duly approved by the medical examiner or medical board of the company, no valid contract of insurance oral or in writing, temporary or permanent, would be valid for the amount applied for in the case at bar when there was no medical examination whatever. The proposed insured is bound to have known that he could not get a valid policy from the defendant without a medical examination and by his failure to furnish such examination he failed to make a complete and valid application. A temporary contract for life insurance in violation of the statute would not be binding on the defendant.

It is asserted by counsel that if the law was violated it was violated by the defendant through its agent and that the defendant is estopped from claiming any benefit from its own wrong. The same could be said with equal force about the various contracts held invalid in the cases cited above, but nevertheless said contracts were held invalid.

Division V.

Alleged Violation of Plaintiff's Rights under 5th and 7th Amendments.

We confess that we have some difficulty in understanding the contentions of opposing counsel that the plaintiff's rights under the 5th and 7th Amendments to the Constitution have been violated. Obviously he is referring to the provision of the 5th Amendment to the effect that no person shall be deprived of property without due process of law and to the provision of

the 7th Amendment that the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law. No decisions of this court or any other court are cited in support of his contentions. As we understand them, they are as follows:

1. That the Court of Appeals violated the plaintiff's right to due process of law under the 5th Amendment in the following particulars:

(a) By trying a law action *de novo* on appeal.

We cannot conceive how it can be claimed that this case was tried *de novo*. The essence of the decision in the Court of Appeals is contained in the third paragraph from the end (R. 96) where the court says:

> "The defendant was legally entitled to have its motion for directed verdict sustained upon the basis that the insurance was not in effect at the time of the applicant's death for the reason that the applicant did not and could not meet the insurability condition set out in the conditional receipt because of his aviation pursuits."

The motion for directed verdict raised this question directly. The court did not try *de novo* any question of fact determined by the jury. It passed on the undisputed evidence and held that there was no question for the jury.

(b) By holding that the defendant's evidence conclusively showed something the defendant never claimed in pleading or evidence or errors assigned on appeal.

Counsel refers to this statement in the opinion (R. 96): "The evidence conclusively shows that the proposed insured because of his aviation activities was not insurable for the amount, plan and rating applied for and that the

defendant made a good faith determination that he was not so insurable." The first clause of this statement is absolutely correct. See testimony of the defendant's vice-president (R. 47, 48) to the effect that an applicant with an aviation record such as Hinkle's would have had to modify the policy applied for by the addition of an aviation exclusion clause or would have had to pay an extra premium. The second clause of the quoted statement is immediately qualified by the discussion in the following paragraph showing that the information as to the applicant's aviation activities would have warranted the defendant's determination that the applicant was not insurable upon receiving the completed application. The statement in the opinion to which counsel objects was not vital to the ultimate decision of the court as stated in Par. 1(a) above. Counsel has absolutely no basis for his assertion that the court went outside the grounds stated in the motion and tried a different law suit than the one presented.

(c) By passing on errors not assigned.

This refers to the statement in the opinion that the trial court erred in holding that good health and insurability are practically synonymous. The case was not reversed because of this holding. The statement was merely made to show the error of the trial court in ignoring the second proviso in the receipt requiring evidence of insurability.

(d) By denying the plaintiff a jury trial.

Surely it cannot be argued seriously that when a case is tried before a jury, and the appellate court holds that as a matter of law there was no question of fact to be decided by a jury, the plaintiff has been denied due process under the 5th Amendment. His right to trial by jury under the 7th Amendment is discussed below.

(e) By admitting evidence over plaintiff's objection in violation of the parol evidence rule and of Sec. 511.34 of the Iowa Code and holding such evidence conclusively true and directing a verdict thereon.

This in itself is meaningless but as nearly as we can determine counsel is referring to the admission in evidence of the application signed by Hinkle and the testimony of Bliss as to his negative answers as to his aviation record. The application was admissible as part of the same transaction as the receipt under the authorities cited in Division II above. The Iowa statute printed as an Appendix to the petitioners' brief on page 48 requires a copy of an application to be attached to a policy when issued and provides that failure to attach the same bars the company from proving the application. Obviously this statute cannot possibly apply to an application where no policy whatever had been issued. The purpose of the statute is to remind the applicant of the statements made by him and the bar of the statute applies when an insurer is defending an action on a policy by claiming it was obtained by false representations in the application.

The assertion by counsel that the Court of Appeals held that Bliss' testimony was conclusively true is a gross misstatement of the record. There is no such holding in the opinion. The Court did say with respect to Bliss' testimony: "We have serious doubt whether there is any substantial evidence to the contrary", but that is far from holding that the testimony was conclusively true. In any event the court went on to hold that the question of who was responsible for the false answers as to aviation was of no importance on the appeal. So that whatever was said about the testimony had no bearing upon the ultimate decision and certainly was no violation of the due process clause.

(f) By rewriting the clause containing the words "rating applied for."

No mention of this point is made in the petition for the writ and under Rule 40(d)(2) points not raised by the petition cannot be raised in the brief on the merits. The testimony of the defendant's vice-president (R. 48) is that with an aviation record such as Hinkle's the policy would not have been issued as applied for. The defendant would have made a counter offer giving the applicant the choice between an aviation exclusion clause and an extra premium.

2. That the Court of Appeals denied plaintiff a jury trial as guaranteed by the 7th Amendment:

(a) "By holding that evidence offered by defendant of a transaction with a man deceased was conclusively true and more especially when defendant's witness was contradicted on all his details by two other witnesses and when the physical appearance of defendant's exhibits contradicted defendant's witness and where the facts testified to were contrary to human nature."

This seems to us to be an extraordinary contention. Counsel is again referring to Bliss' testimony that Hinkle gave him the false answers to the aviation questions and that he wrote them on the application before Hinkle signed it (R. 33). The alleged contradiction is the testimony of a fellow employee, Mrs. Hansen, who said she didn't hear any mention of aviation but she didn't pay much attention to the conversation (R. 35) and another employee, Evans, who didn't hear anything said by Bliss and Hinkle (R. 53). This is hardly a contradiction "on all his details." The physical appearance of the application Exhibit D, a photostatic copy of which is in the Record (19) throws absolutely no light on the question. We don't know what counsel means by the facts being contrary to human na-

ture. He again makes an unabashed misstatement of the record by asserting that the Court of Appeals held that Bliss' testimony was conclusively true. In any event as we have shown in Paragraph 1 (e) above, the truth or falsity of the statements had no bearing upon the ultimate decision of the case by the Court of Appeals. The decision did not deny the plaintiff a jury trial on an issue of fact. It held in substance that there was no fact issue to be decided by the jury.

3. "That the majority procedure was not by the rules of the common law as required by the 7th Amendment."

As stated by Mr. Justice Frankfurter in a foot note to his separate opinion in *Rogers* v. *Missouri-Pacific,* 352 U.S. 524, 1 L.Ed.2d 520, 530, "Any notion that the practice of directing verdicts offends the Seventh Amendment was laid to rest in *Galloway* v. *United States,* 319 U.S. 372, 87 L.Ed. 1458." In that case the question was whether the plaintiff under a war risk insurance policy was totally and permanently disabled and the district court held that there was no sufficient evidence of his disability to go to the jury. This holding was affirmed by the Court of Appeals for the Ninth Circuit and by this court. Justice Rutledge in commenting on the plaintiff's claim that his rights under the 7th Amendment were violated said:

> "But objection has been advanced that, in some manner not wholly clear, the directed verdict practice offends the Seventh Amendment."
>
> * * *
>
> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved

explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; Berry v. United States, 312 U.S. 450, 85 L.Ed. 945, 61 S.Ct. 637. The objection therefore comes too late."

In commenting on the divergent common law rules on procedural matters among the states the opinion goes on to say:

"This difficulty, no doubt, accounts for the amorphous character of the objection now advanced, which insists, not that any single one of the features criticized, but that the cumulative total or the alternative effect of all, was embodied in the Amendment. The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."

In *Diederich* v. *American News Co.*, (10th Cir.) 128 F.2d 144, affirming an order of the trial court directing a verdict for the defendant in a personal injury suit, contrary to a provision of the Oklahoma constitution, the court considered the right of trial by jury as guaranteed by the 7th Amendment, and said:

"This right guaranteed by the Federal Constitution is the right of trial by jury as at common law. It means a trial by a jury of twelve men in the presence and under the superintendence of the judge empowered to instruct them on the law and advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is contrary to the law or the evidence."

* * *

"The power of the judge to pass upon questions of law is just as much an essential part of the process of

trial by jury at common law guaranteed by the Seventh Amendment, as is the power of the jury to pass upon questions of fact."

There are, of course, many cases where the sufficiency of the evidence to support a verdict for the plaintiff is the question that has to be determined by an appellate court. If there is such a sufficiency, the plaintiff is entitled to have the facts of the case determined by a jury. We want to emphasize that in the case at bar there was no fact question involved. If the conditional receipt means what we contend it means, the defendant was entitled to a directed verdict because the applicant was not insurable for the plan and rating applied for. There is no dispute in the facts on this point. If, on the other hand, the receipt created an immediate contract of insurance without any conditions or provisos whatsoever, the plaintiff was entitled to a directed verdict because there is no dispute in the evidence about the payment of the first premium and the execution of the receipt. The trial court did not treat the receipt as an unconditional binding receipt but submitted the case to the jury to determine one question only; whether the applicant was in good health on the date of the receipt as required by the first proviso. The applicant's insurability as required by the second proviso was ignored. No evidence whatever was offered by either party on the question of good health, unless it can be considered that the mere issuance of a medical certificate for a pilot's license two months previously was evidence of good health (R. 50). We submit that there were no questions of fact in the case requiring a jury verdict and that the determination of the case by the trial court should have been based upon a determination of the question of law involved in the construction of the conditional receipt. This question was decided by the Iowa Supreme Court in the *Reynolds*

case referred to many times in this brief. As there is no dispute in the testimony on any vital question of fact and as the case is a case which should be determined by the application of legal principles to an undisputed state of facts, then it cannot be said that the plaintiff has been deprived of a jury trial because the Court of Appeals held that under a proper construction of the receipt under Iowa law, no temporary insurance went into effect "for the reason that the applicant did not, and could not, meet the insurability condition set out in the conditional receipt because of his aviation pursuits."

It is the rule that questions not raised or passed on in an intermediate court will not be reviewed in a higher court. The constitutional questions presented by the petitioner relating to the 5th and 7th Amendments were not raised upon the original submission of this case in the Court of Appeals and consequently were not considered by that court. Opposing counsel states in his brief that the constitutional question was raised in the petition for rehearing and denied. The petition for rehearing is not in the Record before this Court but in view of counsel's statement we feel free to call the Court's attention to what was claimed there. The only claim in the petition was that the court violated the plaintiff's rights under the 5th and 7th Amendments by holding that Bliss' testimony as to his conversation with Hinkle about the decreasing term policy and about his answers in the application as to his aviation record were conclusively true. *As we have pointed out above, there is no such holding in the opinion.* We submit therefore that no constitutional questions were raised or passed upon by the Court of Appeals except the question just referred to which was raised for the first time in the petition for rehearing and which was based upon a misstatement of the Court's opinion. Under these circum-

stances these questions should not be reviewed by this Court, at all, but if the Court does pass on them, we respectfully submit for the reasons stated that the plaintiff's rights under the 5th and 7th Amendments have not been violated in any way.

Division VI.

Federal Jurisdiction.

When this case was removed to the United States District Court for the Southern District of Iowa, opposing counsel filed a motion to remand on the principal ground that the defendant, a Massachusetts corporation, licensed to do business in Iowa, was not a citizen of Massachusetts entitled to remove the case under the diversity of citizenship statute. This motion was overruled and the case proceeded to trial resulting in a verdict and judgment for the plaintiff.

When the case was appealed to the Court of Appeals for the Eighth Circuit the Record in that court was prepared in accordance with its rules. Rule 10a requires the Record to contain a statement of only so much of the entire Record on appeal as essential to show jurisdiction and to enable the court to decide the questions presented for review.

Mr. E. E. Koch, Clerk of that Court, on January 1, 1954, *issued with the approval of the court*, a pamphlet entitled "Suggestions to attorneys concerning appellate rules and practice". On page 2 of that pamphlet the following language is used:

> "Print only so much of the original record on appeal as is necessary to enable the Court to review the questions argued in your brief * * * Counsel for all

parties to the appeal are requested to cooperate in eliminating from the printed record all nonessential matter. *For example in a removed case, omit the removal papers unless removability is an issue.*" (Emphases above are ours).

Pursuant to this rule and suggestion the parties stipulated as shown by the stipulation on Page 1 of the Record:

"It is further agreed that the United States District Court for the Southern District of Iowa, Central Division, had jurisdiction of this cause, docketed in said Court as Civil Action 3-659, and that said case was properly removed by defendant from the District Court of the State of Iowa in and for Polk County to the United States District Court for the Southern District of Iowa, Central Division, and that the petition for removal was filed in said Court on November 8, 1955."

Consequently, the petition for removal, the motion to remand and the District Court's memorandum and order overruling the motion to remand were not made a part of the Record in the Court of Appeals and the only references thereto contained in said Record were those in the stipulation referred to above and in the Docket Entries in the District Court commencing on p. 75 of the Record referring to the petition for removal and memorandum and order overruling the motion to remand.

We submit that having in mind the suggestion of the Clerk for the omission of the removal papers unless removability is in issue, opposing counsel by the stipulation above referred to agreed that it was not an issue. But now in this Court as part of the Record, counsel has had printed commencing on p. 79, the memorandum and order overruling the plaintiff's motion to remand, certified to by the Clerk of the District Court. This is not a part of the Rec-

ord in the Court of Appeals, it is not certified to by the Clerk of that Court, and we submit that it is not properly a part of the Record here. We think it is clear, however, from the Record here as recited in the memorandum of the Court (R. 79) and in the plaintiff's petition in which she alleged that the defendant is a corporation organized under the laws of Massachusetts (R. 2), supported by the stipulation of the parties referred to above, that the necessary jurisdictional facts were stated to support the removal. The Record was satisfactory to the Court of Appeals which said (R. 82): "Jurisdiction based upon diversity of citizenship is established."

We concede that the parties cannot grant jurisdiction to the federal court by consent and that a federal court at any stage of the proceeding can inquire into its jurisdiction. We submit, however, that the stipulation is not a mere consent to jurisdiction; it is a stipulation to the effect that the facts necessary to show jurisdiction were properly presented to the court and that the case was properly removed.

Opposing counsel in his brief filed in this court makes no objection as to the Record. He raises the fundamental proposition that a foreign corporation admitted to do business in a state is not a citizen of the state of its incorporation and therefore is not entitled to removal. We do not think it is necessary to extend this brief by quotations from the long list of decisions commencing in 1844 on this point by this court as all members of the court are undoubtedly familiar with them. We merely mention *Louisville C. & C. R. Co.* v. *Letson*, 43 U.S. 2 How. 497, 11 L.Ed. 353, *Muller* v. *Dows*, 94 U.S. 444, 24 L.Ed. 207; *B. & O. R. R. Co.* v. *Koontz*, 104 U.S. 5, 26 L.Ed. 643; *New England Mutual Life Ins. Co.* v. *Woodworth*, 111 U.S. 138, 28 L.Ed. 379; *St. Louis & S. F. Ry. Co.* v. *James*, 161 U.S. 545, 40 L.Ed. 802; *Southern Ry. Co.* v. *Allison*, 190 U.S. 326,

47 L.Ed. 1079. The ruling of the District Court states that he is bound to adhere to the doctrine established in the Letson case, and as he found that the facts stated were sufficient to establish diversity of citizenship, the motion to remand was overruled.

Division VII.

The Writ of Certiorari Was Improvidently Granted.

We submit with the greatest respect for the Justices who voted to grant the writ of certiorari that it now appears from the briefs of counsel that the writ was improvidently granted for the following reasons:

1.

The case involves no principle "the settlement of which is of importance to the public as distinguished from that of the parties", to quote the often cited language of Chief Justice Taft in *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 67 L.Ed. 712. It is not a case of "peculiar gravity and general importance" as referred to in *Hamilton-Brown Shoe Company* v. *Wolf Bros.*, 240 U.S. 251, 60 L.Ed. 629. It is not a case involving "a question of importance which is in the public interest to be decided by this court of last resort", as stated in *Magnum Import Company* v. *Coty*, 262 U.S. 159, 67 L.Ed 922.

This is simply a case involving a particular private contract, namely, the conditional receipt for a life insurance premium. We find from the cases which have come before the courts involving such receipts that hardly two of them are precisely alike throughout. It is the duty of the court to construe the specific language of the particular receipt under the law of the state in question, and to de-

termine whether the conditions on which it is based have been fulfilled. It is not the kind of a case where certiorari should be granted in view of the limitations on the writ by this court which we have cited above.

2.

The points argued by the petitioner were all presented to the Court of Appeals except those involving the alleged constitutional questions and the question of federal jurisdiction. These were not raised in the Court of Appeals at all and are therefore not referred to in the opinion. The questions of insurance law were argued there and the petitioner is now merely trying to get another hearing on these questions after being defeated in that court. "The jurisdiction to bring up cases for certiorari was not conferred upon this court to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* case, 262 U.S. 159, *supra*.

3.

As a result of the decision in *Erie Railway* v. *Tompkins* this is not a case which presents a conflict between circuits. When questions of life insurance law were regarded as questions of general law it was not uncommon to grant certiorari in life insurance cases where there was such a conflict. At the time of the announcement of the Erie Railway decision, certiorari had already been granted or the petitions therefor distributed in three life insurance cases, *Ruhlin* v. *New York Life*, 304 U.S. 202, 82 L.Ed. 1290, *New York Life* v. *Jackson*, 304 U.S. 261, 82 L.Ed. 1329, and *Rosenthal* v. *New York Life*, 304 U.S. 263, 82 L.Ed. 1330. Following the Erie Railway case, these three cases were remanded for determination under governing state law. Mr. Justice Reed said in the Ruhlin case:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts * * *."

We cannot find a case since Erie Railway became effective in which certiorari has been granted involving a life insurance contract where a Court of Appeals has construed the contract by the application of governing state law to the contract involved.

Chief Justice Vinson in an address before the American Bar Association on September 7, 1949, reported in "Supreme Court Practice" by Stern and Grossman, 2d Edition, p. 107, said:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights and uniformity of judgments.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

For the foregoing reasons we earnestly request the Court to reconsider its granting of the writ and to hold as it has done in many other cases that the writ was improvidently granted. While we have no way of knowing on what ground the writ was granted, we respectfully submit that the briefs of both parties now plainly show that no important question of general law is involved and that there is no conflict between circuits. The alleged federal questions are not in the Record and should not be considered by this Court, and even if in the Record are not of sufficient importance to be reviewed by this court on certiorari.

CONCLUSION.

The respondent respectfully prays that the case be disposed of by an order stating that it now appears from the arguments that the writ of certiorari was improvidently granted or by an affirmance of the decision of the Court of Appeals.

Respectfully submitted,

PHINEAS M. HENRY,
Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. [redacted] 28

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR REHEARING.

LELAND S. FORREST,
25 Law Building at Drake University,
Des Moines, Iowa,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 714.

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR REHEARING.

The Petitioners respectfully petition the Court for a rehearing under Rule 58, on the decision made herein on November 10, 1958, dismissing the certiorari as "improvidently granted". Oral Argument, set for October 21, was belatedly moved forward a week, and Petitioners did not have time after they learned of the change to print a Reply Brief, and thus the Court overlooked the follow-

ing, including Public Law 513, 85th Cong., 2d Session, H. R. 11102:

1. The case involved the following principles the settlement of which *IS* of the greatest public importance as distinguished from that of the parties:

I.

Removal by a corporation does not fall within the Judicial Power of the United States, and the case should be remanded, as a corporation is not a citizen of any state, and the case was not "between citizens of different states".

Marshall v. *B. & O. R. R. Co.*, 16 How. 314, 14 L. Ed. 953. See our argument on page 45, Brief for Petitioners.

1. The stipulation signed by the parties appearing on page 1, Transcript of Record, does not waive the jurisdictional facts, and is equivalent to the situation in Rexford v. Brunswick-Balke Co., 228 U.S. 339, where the distinction was made as follows:

   a. "The existence of diversity of citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and *cannot be waived* by either party."

      Powers v. *Chesapeake & Ohio Railway Co.*, 168 U.S. 92, 98, and quoted with approval by Mr. Justice Van Deventer in Rexford case, *supra*.

After certiorari was granted in this case, the Congress recognized the importance of the fact that a corporation was not a citizen, by amending Title 28, U. S. Code, section 1441, and inserted in said amendment, effective as to

actions commenced after July 25, 1958, that a corporation shall be considered a citizen of the state where incorporated and the state where it has its principal place of business for the purpose of diversity jurisdiction. See, Wisconsin Bar Bulletin, August, 1958, page 74; Public Law 513. 85th Cong., H. R. 11102. The Act became effective July 25, 1958, and thus has no direct bearing on the case at bar, except it shows the Congress considered that heretofore a corporation was not a citizen, otherwise such legislation would be a useless act; and it further shows that the corporations and their "public relations departments" predicted that this Court would hold herein that they were not citizens for removal purposes, so they thought it of public importance to take care of the matter for the future.

Such Act of Congress makes this proposition as to citizenship of corporations more important to the public than before, not only that it demonstrates that such legislation was necessary, but it is an attempt of Congress to enlarge the judicial power defined in Article III, section 2 by definition. Unless this Court decides herein that prior to this Act a corporation was not a citizen for removal purposes, it perhaps will never have an opportunity to check the tendency of Congress to enlarge such jurisdiction by definition as limited in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 333 U.S. 860.

To so hold is of public importance further because 60 per cent of the cases in the federal district courts are due to diversity, See American Bar Association Journal, March, 1958, and most of these, removals by corporations, accompanied with all the evils pointed out in discussing the Tompkins case. By holding the obvious herein, the Court can eliminate about 60 per cent of its crowded docket.

We submit, that for the reasons above the Court should hold that a corporation was not a citizen for re-

moval purposes, prior to July 25, 1958, and thus leave open the constitutionality of the late Act, the answer to which is obvious under the *Tidewater case*, 333 U.S. 860.

II.

Most insurance companies use interim contracts worded in legal effect similar to the one at bar, and extract from those who get policies more than 42 million dollars a year for interim premiums, and it is of public importance that these people get something for their 42 million dollars annually.

The importance to the public of insurance companies throughout the nation misleading and disappointing the public with contracts of the type sued upon is pointed out in the dissenting opinion filed in the Circuit, and appears on page 96, Transcript of Record, and although Petitioners failed to point out this importance under one heading in their Brief, they did point out the public importance of each of their four contentions by stating at the end of each what the federal rule should be as to each, and why such was important.

As shown by the prevailing opinion, see Transcript of Record, page 88, and their citation from 2 A. L. R., this type of contract is a national problem, and whichever of the four types mentioned therein is used, somebody is paying a premium, when he gets a policy, for back insurance that he did not have.

The contracts in these various circuits cited in the briefs on both sides were not different, as contended by Respondent. They did not contain the exact words, but the intent of the companies in each was exactly the same, as follows:

First clause: There is in each an insuring clause, at least designed to make the insured believe that if he pays on the date of the application his insurance takes effect at some named date prior to delivery of the policy.

This first clause in the case at bar was definite and was not ambiguous, "the insurance applied for is in full force from this date".

In the Iowa Reynolds case this first clause was somewhat less definite, but could be understood to take effect on the date of the physical examination. In the Gault case in the Second Circuit this first clause was not so clear, but could have been construed by an insured to be effective prior to the issuance of the policy; and the same is true as to the first clause in the case in the Sixth Circuit.

Second clause: The catch in each of these contracts is in the second clause, which is not stated in the same words, but the design in each is exactly the same, namely to state a "proviso", or condition, which is impossible of happening until a policy is approved by the company, if this second clause is interpreted the way an "insurance underwriter would interpret it." For example, the second clause in the receipt in the Sixth Circuit said, "provided a policy is delivered to the insured or his representatives", and the one in the Second Circuit said, "if the company is satisfied that the applicant is insurable on" * * * the date of his physical examination, whereas the one at bar says, "provided satisfactory evidence that he is insurable for the amount, plan and rating applied for is received at the home office", and in all the cases the insurance companies contend that such second clauses make it impossible for the insurance to be effective until they decide to issue a policy, at least. In other words, they are attempting to make it absolutely impossible for the insurance to be ef-

fective until they issue the policy, but at the same time they attempt to make it possible when they deliver the policy to collect premium from the prior named date, in the one at bar, the date of the application, in Reynolds, the date of the physical examination. But the intent is the same, to lead insured to believe he has immediate insurance, thus to collect a premium over a period prior to the policy, and still not be liable if the party dies before he gets, or they determine to issue, a policy. This second clause is of the greatest public importance, because of the large amount of premiums collected from people who do get their policies, when in fact they are paying for something that did not exist. We will point out later by statistics the millions of dollars the insurance companies in the whole nation collect in any one year from people who do get policies, which makes them pay for insurance that did not exist. It is a national problem of interest to the millions of men each year who take out insurance, of interest to every insurance company in America to know whether such decisions as the Nertney case in Iowa, can be circumvented in the federal courts, and in which states and in which Circuits they can thus play "heads I win, tails you lose" with these contracts, and in which ones they can not, and we submit that it is of enough interest to all America that it can not be permitted anywhere, as decided in the Iowa Nertney case, and intimated in the Gault case.

Third clause: These contracts have a similar third clause, which is either another condition that is impossible of happening, if interpreted by an insurance underwriter, or is in the nature of a defeasance clause. The prevailing opinion of the Court of Appeals treated the one at bar as a defeasance clause, similar to the third clause of the Reynolds, Iowa, case, without noticing that it was in the disjunctive and not the conjunctive, as in the Reynolds case. The

trial court was a little more observing, and noticed the difference, the disjunctive, and thus held it had no application which obviously is more accurate than the Appeal Court, and makes no difference here, as we are merely illustrating that all this type of contracts are the same as far as their ultimate facts according to their legal effect is concerned. The only difference in the case at bar and the cases in the other circuits is that the legal effect of the first clause in all the others is that it is ambiguous as to whether the insurance is in effect at once, whereas in the one at bar, there is no ambiguity in the first clause, it states positively that it is in full force "on this date". If the difference were the other way, the decisions in the other two circuits would not be in conflict with this decision, but since this first clause is not ambiguous, like the first clauses in the other two circuits, the opinion is in conflict with those two circuits, because if those circuits will hold the insurance in effect with an ambiguous first clause, they would hold it equally in effect where the first clause is so plain and so unambiguous, so definite that it is in "full force and effect as of this date".

But when we say the first clause is not ambiguous, such does not mean that the entire contract is clear and needs no interpretation. Obviously the second clauses in all these contracts contradict the first clauses. Words and clauses are "ambiguous", clauses contradict each other, and thus make the meaning of the whole contract uncertain or misleading, sometimes called making the contract as a whole "ambiguous", but "uncertain" or "misleading" is the better term when applied to the whole, although most courts use the term "ambiguous", when clauses contradict each other. In such a situation, the Reynolds case, the Gault case and the case in the Sixth, read the first clause the way a person inexperienced in insurance would read it, ignored the second

clause because it "contradicted" the first clause, and held the company liable because they were dating the premium back. Such holding by those courts is a determination of the applicable state law. The Iowa Supreme Court has determined the Iowa law to be the same, as follows:

d. Where the policy covers the risk from the date of the application, it is apparent that the insured pays for insurance from the stipulated period beginning with the application, not the date of its acceptance * * *. The injustice of saying that, on the acceptance of the application, the insured has had protection from the prior date where no loss occurred, where it is also said that he is not protected if a loss did occur, is plain."

Nertney v. *Nat. Fire Ins. Co.*, 199 Iowa 1358, 203 N.W. 826.

To the same effect in life insurance is a statement in *Reynolds* v. *N. W. M. Life Ins. Co.*, 189 Iowa 76, 176 N.W. 207.

a. "Under the well recognized rule, it (a writing) is to be construed against the author of it, rather than in his favor."

Central N. R. Fire Ins. Co. v. *Omaha L. Ins. Co.*, 194 Iowa 255, 189 N.W. 723.

b. "Where one who drafts a document uses ambiguous language, or fairly admitted of more than one construction, the meaning to give it is that in which they were understood by the other party."

Minnesota Linseed Oil Co. v. *Montague & Smith*, 65 Iowa 67, 21 N.W. 141.

c. "Court should interpret a contract in the light of the purpose of the buyer in entering into it."

McCormick Harvesting Machine Co. v. *Williams*, 99 Iowa 601, 68 N.W. 607.

These Iowa decisions hold the same as Judge Hand held the state law to be in the Gault case, and thus the Eighth and Second circuits are in conflict.

We respectfully submit, that all these contracts are in legal effect alike, and they present an important problem to the entire public, this certiorari is in behalf of all those who have policies, and is against all the insurance companies in America, to determine whether the millions paid in back premiums when a policy is delivered, have been an "unjust enrichment" to the insurance world.

The public records of the Insurance Department of the State of Iowa show that the total amount of life insurance written in the state by all insurance companies in the year 1954 (the year that was just completed at the time this receipt, Exhibit 1, was delivered) was $637,288,000, or in round figures 637 million dollars. The defendant company in that year delivered $2,514,000 policies in Iowa, or in round figures 2 million dollars. These figures are the total amounts of the face of the policies. These policies went to the people who lived and got them. The figures do not include those who died, if any, in that year and got no policies.

All companies now do what defendant did. The statement at the bottom of Exhibit 1 contemplates 60 days for defendant to investigate and determine on a policy. To examine an applicant, mail the reports to Boston, and instigate the investigation defendant testified it was its underwriting practice to do, will take some time, but maybe not the 60 days they contemplate, so let us figure the premiums on 30 days. In round figures the premium in this case was $21 on $10,000 for three months, or roughly $7 a month. Thus if every insurance company delayed only one month before delivering the policy and then dated the

policy the date of the application (as defendant intended to do here) the people who lived and got policies in 1954 in Iowa paid to the insurance companies for insurance that did not exist the sum of $445,900, based on round figures. If each company took the full 60 days allowed itself under this receipt, then the "take" was $880,000 in round numbers. Nearly a million dollars collected in one state alone in one year for insurance that cannot be collected in the Eighth Circuit.

Public policy is not based upon what damage a scheme does to the individual litigant, but what effect the general rule of law is going to have on the rest of the community in the future. The opinion in the Eighth Circuit enables all insurance companies to collect up to 60 days back premium if they deliver a policy, and escape liability if the insured happened to get killed. It costs the people of Iowa anywhere from $14,666 to $880,000 a year for worthless insurance. If Iowa is typical of the other states, it would cost the people of America 48 times those amounts, or as much as 42 MILLION DOLLARS a year for interim premium. THE COURTS OF IOWA have declared in the two cases cited, *supra*, that such a result is an "injustice", and not to be permitted in Iowa, yet the Eighth Circuit defeats the Iowa Courts.

We submit that the rule for the circuits should be as stated in the Gault case, either by Judge Hand, read the contract the way an ordinary insured would read it, or by Judge Clark, to the effect that such contracts are effective as a matter of equity; either of which is the same as what the Iowa *decisions* declare.

III.

In a diversity case, the finding of the Court of Appeals that the applicable state law is the opposite of the rule announced by the highest court of the state in existing decisions of the state court, or the failure to mention or to follow those decisions, is not due process of law, in violation of the Fifth Amendment.

Erie Railway v. *Tompkins*, 304 U.S. 64.

It is of importance to all the lower federal courts, to clarify the real intent of the Erie case, as to whether it was intended to compel the federal court to be bound by the *decisions* of the highest court of the state, or whether it merely ordered the federal courts to find the *law* of the applicable state without following that state's *decisions*, so long as the federal court did not base its opinion on "general common law".

If the Erie rule means the latter, it serves no useful purpose. As stated by Judge Magruder in the First Circuit, in *Sampson* v. *Channell*, 110 F. 2d 754,

> "Until the point is finally ruled upon by the Supreme Court, lower courts must piece out as best they can the implications for the Tompkins case. The theory is that the federal court in Massachusetts sits as a court coordinate with the Massachusetts state courts to apply the Massachusetts law in diversity cases. Under Swift v. Tyson, *supra*, the federal courts were free to disregard state court *decisions* on matters of 'general law', and this included state court *decisions* on the common law relating to conflict of laws. * * * But under the Tompkins case the Massachusetts law must be determined by the state statutes and the common law *as interpreted by the state courts*, not by the federal court's notion of 'general law'."

When certiorari was denied in the Channel case, perhaps this Court approved the interpretation of the *Erie case* as given by Judge Magruder, 310 U.S. 650. The cases cited for dismissal herein, are not diversity cases and do not involve the evils sought to be avoided by Justice Brandeis, or those involved in removals for diversity reasons, and it would seem that the interpretation put upon the Erie rule by Judge Magruder would be more realistic, and more nearly accomplish the purpose of the Erie opinion, *i. e.*, the federal courts are bound by the *decisions* of the state court, not merely find in their own way the *state law*.

The evil that the Erie case sought to eliminate can best be avoided if the Court approves the statement from Goodrich, The Conflict of Laws (2d ed.) 24, as follows:

> "The final result (of the Tompkins case) is proper and desirable; it prevents a difference in *decision* depending upon whether suit is brought in the state or federal courts, and one more possibility of divergence based upon the fortuitous event of the forum chosen has been abolished."

The Court of Appeals refused to follow the Iowa *decision* on the following points of law: After erroneously finding the important fact as to whether the company determined Hinkle's insurability at its home office as required by Iowa decisions, the prevailing opinion holds on page 96, Transcript,

> "There was no time for investigation prior to applicant's death. Any delay in the investigation under such circumstances was in no way prejudicial to plaintiff."

Such ignores definite Iowa decisions relating to "mending his hold". Defendant pleaded in its answer, Transcript, p. 9, "that shortly after the death of W. Max Hinkle", Rod-

ney Bliss notified an attorney representing the plaintiff, "That the application for insurance on the life of W. Max Hinkle had never been completed because of the failure of Hinkle to take a physical examination and that no insurance on his life was in force". This pleading is corroborated by the testimony of Mrs. Hinkle on page 29 of the Transcript. Defendant denied liability for a different reason than it now claims on appeal, and the Court of Appeals by the statement above quoted rejected the Iowa *decisions* on "mending his hold" as stated in *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 314, 103 N.W. 207, and such rejection is not due process.

Again, on page 92 of the Transcript, the prevailing opinion says the trial court erred in taking the position that good health and insurability were practically synonymous, and says, "While there are some authorities to support such position, the weight of authority and the better rule are contrary".

Such ignores the basic major premise of the Iowa decisions, namely, if a word has more than one meaning, it must be given the meaning most favorable to the insured, or the one who did not draft the document. See *Central N. R. Fire Ins. Co.* v. *Omaha L. Ins. Co.*, 194 Iowa 67, *ante*, and *Minnesota Linseed Oil Co.* v. *Montague & Smith*, *ante*.

Thus, under the Iowa decisions, if there is a split of authority on the meaning of a word, it is impossible for there to be a "weight of authority", for the same word, "insurable", might mean exactly the opposite in any two Iowa cases, because in one case one meaning might be more favorable to the insured, whereas in the next case the other meaning might be more favorable, and in the case at bar "good health" was the more favorable to the insured, and under the Iowa decisions the federal court was

required to give it that meaning, and such is what the trial court did, and the above is the reason for it, and it was not due process to reverse him on that point when he was following the Iowa *decisions*.

A matter of the greatest public importance to the lawyer and his clients at the "grass roots" is diversity cases where defendants remove to the federal courts or plaintiffs, and Tompkins did, commence cases in federal courts, for the obvious purpose of circumventing the *decisions* of the highest court of the state. The Erie case offered a partial solution, but if given a restricted application, does not cure the evil. Petitioners stated four propositions all of which are so interwoven that to separate them gives no solution to the national problem, and what the prevailing opinion did in this case illustrates all the evils that existed under *Swift* v. *Tyson*. If the Court can ignore state *decisions*, in determining the law of the state, the evil still exists unless such ignoring decisions is not due process. If the Court can find the facts contrary to the pleading and the evidence, as the majority did, as to whether the company determined in its usual course of passing on application that Hinkle was not insurable, the evil still exists, unless the Court will protect the parties under the Seventh Amendment guaranteeing a jury trial on disputed facts.

We submit this case is of public importance, for it illustrates all the evils of *Swift* v. *Tyson*, illustrates how federal courts can avoid the Erie rule and get a result different than the state court would reach; and further submit that the dissenting opinion of the court below is more in conformity with the Iowa decisions and with the Second and Sixth Circuits, and is the rule most to the public interest, and that the dissenting opinion should be made the law of this case, or at least that the whole problem presented by

diversity cases be solved by holding that a corporation is not a citizen for removal purposes, and the case, and all others like it, be remanded and solved in the state courts, where most diversity cases can best be handled.

Respectfully submitted,

L. S. FORREST,
Counsel for Petitioners.

CERTIFICATE.

I, L. S. Forrest, hereby certify that this petition is presented in good faith and not for delay.

L. S. FORREST,
Counsel for Petitioners.